(15)

No. 87-1651-CSY
Status: GRANTED

Title: Massachusetts, Petitioner
v.
Douglas Oakes

Docketed:
April 1, 1988

Court: Supreme Judicial Court
of Massachusetts

Counsel for petitioner: Shannon,James M.

Counsel for respondent: Vita,Richard J.

| Entry | Date | Note | Proceedings and Orders |
|---|---|---|---|
| 1 | Apr 1 1988 | G | Petition for writ of certiorari filed. |
| 2 | Apr 12 1988 | | Appendix of petitioner Massachusetts filed. |
| 3 | May 2 1988 | | Brief of respondent Douglas Oakes in opposition filed. |
| 4 | May 4 1988 | | DISTRIBUTED. May 19, 1988 |
| 5 | May 23 1988 | | Petition GRANTED. |
| | | | ********** |
| 7 | Jun 22 1988 | | Order extending time to file brief of petitioner on the merits until July 21, 1988. |
| 8 | Jul 21 1988 | | Brief of petitioner Massachusetts filed. |
| 9 | Jul 21 1988 | | Joint appendix filed. |
| 10 | Jul 21 1988 | G | Motion of Massachusetts Society for Prevention of Cruelty to Children, et al. for leave to file a brief as amici curiae filed. |
| 11 | Jul 21 1988 | | Brief amicus curiae of District Attorney for the Middle District of MA filed. |
| 13 | Jul 21 1988 | | Brief amicus curiae of Citizens for Decency Through Law, Inc. filed. |
| 14 | Jul 21 1988 | | Brief amicus curiae of Indiana filed. |
| 15 | Jul 21 1988 | G | Motion of Covenant House, et al. for leave to file a brief as amici curiae filed. |
| 12 | Jul 25 1988 | | Lodgings received. (40 copies). |
| 17 | Aug 22 1988 | | Order extending time to file brief of respondent on the merits until September 19, 1988. |
| 23 | Sep 3 1988 | G | Application (A88-238) to extend the time to file a reply brief from October 16, 1988 to November 7, 1988, submitted to Justice Brennan. |
| 20 | Sep 14 1988 | | Brief amicus curiae of American Sunbathing Assn., Inc. filed. |
| 18 | Sep 15 1988 | | Motion of Massachusetts Society for Prevention of Cruelty to Children, et al. for leave to file a brief as amici curiae GRANTED. |
| 19 | Sep 15 1988 | | Motion of Covenant House, et al. for leave to file a brief as amici curiae GRANTED. |
| 21 | Sep 16 1988 | | Brief of respondent Douglas Oakes filed. |
| 22 | Sep 19 1988 | | Brief amicus curiae of Law & Humanities Institute filed. |
| 24 | Sep 22 1988 | | Application (A88-238) granted by Justice Brennan extending the time to file until November 7, 1988. |
| 26 | Oct 21 1988 | | Record filed. |
| 25 | Oct 24 1988 | | SET FOR ARGUMENT. Tuesday, January 17, 1989. (3rd case) (1 hr.) |
| 27 | Nov 4 1988 | | CIRCULATED. |
| 28 | Nov 7 1988 | X | Reply brief of petitioner Massachusetts filed. |

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87-1651

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CLERK

NO. 87-

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

COMMONWEALTH OF MASSACHUSETTS,

Petitioner,

v.

DOUGLAS OAKES,

Respondent.

Petition for a Writ of Certiorari to the Supreme Judicial Court for the Commonwealth of Massachusetts

JAMES M. SHANNON*
ATTORNEY GENERAL
COMMONWEALTH OF MASSACHUSETTS

John Pappalardo
Deputy Attorney General
Madelyn Wessel
Assistant Attorney General

One Ashburton Place, Rm. 2001
Boston, Massachusetts 02108
Tel.: 617-727-4538

*Counsel of Record

## QUESTION PRESENTED

Whether possible application of a criminal statute designed to prevent the sexual abuse and exploitation of children, to marginal conduct arguably protected by the First Amendment, justifies invalidation of the entire statute on overbreadth grounds and reversal of respondent's conviction without deciding whether the respondent's actions were within the statute's substantial legitimate reach.

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NO. 87-

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IN THE
SUPREME COURT OF THE UNITED STATES

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OCTOBER TERM, 1987

COMMONWEALTH OF MASSACHUSETTS,

Petitioner,

v.

DOUGLAS OAKES,

Respondent.

---

Petition for a Writ of Certiorari
to the Supreme Judicial Court for
the Commonwealth of Massachusetts

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The petitioner, Commonwealth of Massachusetts, hereby petitions this Court for a writ of certiorari to review the judgment of the Supreme Judicial Court for the Commonwealth of Massachusetts.

## OPINION BELOW

The opinion of the Supreme Judicial Court for the Commonwealth of Massachusetts is reported at 401 Mass. 602, 518 N.E.2d 836 (1988), and is reproduced here in the Appendix at 1.

## JURISDICTION

The Opinion and Order of the Supreme Judicial Court for the Commonwealth of Massachusetts was entered on February 1, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3) (1982).



## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment of the United States Constitution provides, in pertinent part:

> Congress shall make no law . . . abridging the freedom of speech, or of the press. . . .

The Fourteenth Amendment of the United States Constitution provides, in pertinent part:

> [N]or shall any state deprive any person of life, liberty, or property, without due process of law. . . .

The relevant sections of Chapter 272 of the General Laws of Massachusetts provide:

> Whoever with knowledge that a person is a child under eighteen years of age, or whoever while in possession of such facts that he should have reason to know that such person is a child under eighteen years of age, hires, coerces, solicits or entices, employs, procures, uses, causes, encourages,

or knowingly permits such child to pose or be exhibited in a state of nudity or to participate or engage in any act that depicts, describes or represents sexual conduct for purposes of visual representation or reproduction in any book, magazine, pamphlet, motion picture film, photograph, or picture shall be punished by imprisonment in the state prison for a term of not less than ten nor more than twenty years, or by a fine of not less than ten thousand dollars nor more than fifty thousand dollars, or by both such fine and imprisonment.

It shall be a defense in any prosecution pursuant to this section that such visual presentation or reproduction of any posture or exhibition in a state of nudity was produced, processed, published, printed or manufactured for a bona fide scientific or medical purpose, or for an educational or cultural purpose for a bona fide school, museum or library.

Mass. Gen. Laws Ann. c.272, §29A (West Supp. 1987).1/

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1/ Section 29A was amended by St. 1987, c.294, §1 to include "any live performance," an amendment which does not apply to this case. See also, Commonwealth v. Oakes, 401 Mass. 602, 603 n.1., 518 N.E.2d 836, 837 n.1 (1988).



As used in sections twenty-eight, twenty-eight C, twenty-eight D, twenty-eight E, twenty-nine, twenty-nine A, twenty-nine B, thirty and thirty D, the following words shall, unless the context requires otherwise, have the following meanings: . . .

"Nudity", uncovered or less than opaquely covered post-pubertal human genitals, pubic areas, the post-pubertal human female breast below a point immediately above the top of the areola, or the covered male genitals in a discernibly turgid state. For purposes of this definition a female breast is considered uncovered if the nipple or the nipple or areola only are covered. In the case of pre-pubertal persons nudity shall mean uncovered or less than opaquely covered pre-pubertal human genitals or pubic area. . . .

Mass. Gen. Laws Ann. c.272, §31 (West Supp. 1987).

## STATEMENT OF THE CASE

On Janury 9, 1985, respondent Douglas Oakes ("Oakes") was indicted by a Worcester County grand jury for "soliciting a child to pose for pornographic purposes" in violation of Mass. Gen. Laws Ann. c.272, Section 29A (West 1987). The indictment arose out of photographs which were taken in January 1984 of Oakes' then fourteen year old stepdaughter. (Trial Tr. at 22, 24-26.)

On March 21, 1985, Oakes filed motions to dismiss the indictment challenging its constitutionality, and requesting a report[2/] to the Appeals

2/ Under Mass. R. Crim. P. 34, a trial judge may report an important or doubtful question of law to the Appeals Court for decision.



Court of Massachusetts. Both of these motions were denied by a judge of the Superior Court in an unreported memorandum and order.

On October 10, 1985, Oakes was tried before a jury. Testimony by three witnesses -- Oakes, his stepdaughter and his ex-wife -- revealed that Oakes took numerous photographs of his stepdaughter, then fourteen years of age. (Trial Tr. at 22, 24, 30). At first, Oakes photographed her in casual clothing and body suits. (Trial Tr. at 24). He also photographed his stepdaughter in outfits purchased at "Fredericks of Hollywood." (Trial Tr. at 65-67).

In February of 1984, when no other member of the family was present, Oakes posed his stepdaughter in various

positions on a bar in the family room, clothed only in bikini underpants and with a scarf draped around her neck. (Trial Tr. at 24-26). When the girl later saw the photographs, she ripped them up and threw them in the woods. (Trial Tr. 26-27). When Oakes found out about this, he made her return to the woods and retrieve the pictures. (Trial Tr. at 27).

These photographs were subsequently hidden in a false ceiling in the basement of the house. (Trial Tr. at 34, 36). Where they were ultimately discovered, the girl's mother took them to the police. (Trial Tr. 36, 50). Oakes denied taking the photographs. (Trial Tr. at 57, 58).

Oakes was found guilty of the offense charged and appealed to the



Appeals Court of Massachusetts. His appeal was transferred to the Supreme Judical Court on its own initiative in accordance with Mass. Gen. Laws Ann. c.211A, §10 (West Supp. 1987). The case was argued in the Supreme Judicial Court on February 3, 1987. On February 1, 1988, the full court, in a four to three decision, reversed Oakes' conviction and dismissed the indictment. The majority reasoned that photography is expression entitled to First Amendment Protection. Because §29A could be construed to criminalize conduct the majority viewed as clearly lawful, such as a parent's photographing of a naked one year old child on a beach, the majority found the statute to be fatally overbroad. The majority therefore struck down the statute in its entirety, without

determining whether Oakes' conduct could properly be criminalized.

The three dissenting judges concluded that §29A regulates conduct and not expression, and that the majority erred in applying a First Amendment overbreadth analysis to the case. The dissenters were of the view that the statute embodied the Commonwealth's legitimate interest in protecting children from sexual abuse and exploitation, and that, as applied to Oakes, the statute bore a reasonable relation to this legitimate legislative objective.



## REASONS FOR GRANTING THE WRIT

### I. THE DECISION BELOW CONFLICTS WITH THIS COURT'S FIRST AMENDMENT SUBSTANTIAL OVERBREADTH DOCTRINE AS ESTABLISHED IN BROADRICK AND FERBER

In the decision under review, the Supreme Judicial Court invalidated the Massachusetts child pornography production statute on facial overbreadth grounds. The Court did so without examining whether the statute addressed a central core of constitutionally regulable criminal conduct, or whether Oakes' conduct in the case could be constitutionally prohibited. This decision conflicts with this Court's requirement that First Amendment overbreadth invalidation be viewed as a drastic remedy, appropriate only where a statute's infringement on expression is substantial in relationship to its

legitimate sweep. New York v. Ferber, 458 U.S. 747 (1982); Broadrick v. Oklahoma, 413 U.S. 601 (1973); see Section A, infra. The ruling below conflicts with the decision of this Court in Ferber and with decisions of other federal and state courts finding the production and distribution of child pornography to be constitutionally prohibitable criminal conduct. See Section B, infra. For these and other reasons more fully set forth below, the writ should be granted.

A. First Amendment Overbreadth Is A Drastic Remedy To Be Applied Only When Infringements On Expression Are Substantial.

The First Amendment overbreadth doctrine is an exception to the general rule that a person to whom a statute may constitutionally be applied may not be



heard to challenge it on the grounds that it might conceivably be unconstitutionally applied to others in cases not before the court. New York v. Ferber, 458 U.S. at 767; Broadrick v. Oklahoma, 413 U.S. at 610.

Beyond this "standing" component, the overbreadth doctrine also expresses a substantive constitutional standard for determining the validity of a statute affecting expression. See Monaghan, Overbreadth, 1981 S.Ct. Rev. 1, 3. Overbreadth used in this sense describes a challenge "to a statute that in all its applications directly restricts protected first amendment activity and does not employ means narrowly tailored to serve a compelling governmental interest." Secretary of State of Maryland

v. J. H. Munson Co., 467 U.S. 947, 965-66, n.13 (1984) (emphasis added).

Because the impact of the overbreadth doctrine can be devastating, leading, as in the present case, to total invalidation of a statutory scheme of profound importance to a state, this Court has made clear its view that the doctrine is "strong medicine" to be used "only as a last resort." Broadrick, 413 U.S. at 613, quoted in Ferber, 458 U.S. at 769.

For this reason, "'[i]n a facial challenge to the overbreadth and vagueness of a law, a court's first task is to determine whether the enactment reaches a substantial amount of constitutionally protected conduct.'" Hoffman Estates v. The Flipside, Hoffman Estates, Inc., 455 U.S. 489, 494 (1982) quoted in



City of Houston, Texas v. Hill, ___ U.S. ___, ___ 107 S.Ct. 2502, 2508 (1987).

Moreover, where conduct as well as speech is involved, this Court has made clear that the overbreadth of a statute must be substantial "judged in relation to the statute's plainly legitimate sweep." Id. Facial invalidation is an inappropriate "cure" for potential marginal infringements of First Amendment values, where "'the remainder of the statute . . . covers a whole range of easily identifiable and constitutionally proscribable . . . conduct . . . .'" Ferber, 458 U.S. at 771, n.25, quoting from CSC v. Letter Carriers, 413 U.S. 548, 580-81 (1973).

"Substantial overbreadth" is thus "a criterion the Court has invoked to avoid striking down a statute on its face simply because of the possibility that

it might be applied in an unconstitutional manner." Munson, 467 U.S. at 964. This requirement derives from the very nature and purpose of the overbreadth doctrine: "While a sweeping statute, or one incapable of limitation, has the potential to repeatedly chill the exercise of expressive activity by many individuals, the extent of deterrence of protected speech can be expected to decrease with the declining reach of the regulation." Ferber, 458 U.S. at 772.

Where the statute is aimed at criminal conduct, concern over its potential chilling effect diminishes even further. As this Court explained in Broadrick, the limited role of the overbreadth doctrine:



> attenuates as the otherwise unprotected behavior that it forbids the State to sanction moves from 'pure speech' toward conduct and that conduct -- even if expressive -- falls within the scope of otherwise valid criminal laws that reflect legitimate state interests in maintaining comprehensive controls over harmful, constitutionally unprotected conduct. Although such laws, if too broadly worded, may deter protected speech to some unknown extent, there comes a point where that effect -- at best a prediction -- cannot, with confidence, justify invalidating a statute on its face and so prohibiting a State from enforcing the statute against conduct that is admittedly within its power to proscribe.

413 U.S. at 615.

B. Massachusetts General Laws Chapter 272 Section 29A Regulates A Central Core Of Criminal Conduct And Reflects The Commonwealth's Compelling Interest In Preventing Child Sexual Abuse.

The foregoing makes clear that the key inquiry in an overbreadth challenge to a state criminal statutory scheme is

whether the statute describes a "central core of constitutionally regulable conduct." Ferber, 458 U.S. at 771, n.26. As this Court established in Ferber, a state statutory scheme that focuses on the production or dissemination of child pornography easily passes muster under such an inquiry. Cf. City of Houston v. Hill, ___ U.S. at ___, 107 S.Ct. at 2508 (statute invalid which dealt not with core criminal conduct but with constitutionally protected speech).

This Court already has noted that "virtually all of the States and the United States have passed legislation proscribing the production of or otherwise combatting 'child pornography.'" Ferber, 458 U.S. at 758. The fact that the production of child pornography has been made "illegal



throughout the Nation," Ferber, 458 U.S. at 761, reflects the uniform legislative and medical judgment that "the use of children as subjects of pornographic materials is harmful to the physiological, emotional, and mental health of the child." Id. at 758. Indeed, this Court has stated that the constitutionality of laws prohibiting the use of children in the production of pornographic films and photographs "has not been questioned," and that "enforceable production laws would leave no child pornography to be marketed." Id. at 762. Because of the state's compelling interest in preventing the sexual abuse and exploitation of children and for other reasons, Ferber established that states are entitled to greater leeway in the regulation of

pornographic depictions of children than might be appropriate in other contexts. Id. at 757.[3/]

Other courts that have reviewed statutes designed to prevent the sexual abuse and exploitation of children through their use in the production of child pornography have uniformly considered those statutes to be production laws, easily capable of withstanding attacks on First Amendment

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3/ Indeed, the Ferber court cited to Section 29A in including Massachusetts among the twenty states which had prohibited the distribution of material depicting children engaged in sexual conduct without requiring that the material be legally obscene. Id. at 749, n.2.



grounds.[4/]

In examining such statutes, courts have reasoned that "the activity engaged in by the defendant and prohibited by the statute is distinctly conduct as contrasted with speech. . . ." State v. Helgoth, 691 S.W. 2d 281, 284 (Mo.

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4/ See, e.g., State v. Helgoth, 691 S.W. 2d 281 (Mo. 1985) (defendant's habeas petition on similar grounds rejected in 640 F.Supp. 1251 (E.D. Mo. 1986)); Payne v. Commonwealth, 623 S.W.2d 867, 872 (Ky. 1981), cert. denied, 456 U.S. 909 (1982); Griffin v. State, 396 So.2d 152 (Fla. 1981); People v. Folk, 109 Misc.2d 738, 440 N.Y.S.2d 984 (1981). See also United States v. Smith, 795 F.2d 841, 845 (9th Cir. 1986) (interpreting 18 U.S.C. §2251(a) (Supp. 1984) which makes illegal the inducement of children into sexual conduct for the purpose of creating visual depictions of that conduct); United States v. Reedy, 632 F. Supp. 1415, 1416 (W. D. Okla. 1986) (18 U.S.C. §2251(a) (Supp. 1984) not unconstitutionally vague or overbroad where defendant photographed his daughter and her girlfriend in the nude).

1985). Similarly, the Supreme Court of Kentucky stated its view that: "The courts clearly distinguish statutes protecting a minor from actual use in a sexual performance. Such conduct does not give rise to the same special free speech protection given the film or other media." Payne v. Commonwealth, 623 S.W.2d 867, 871 (Ky. 1981). Accord, United States v. Reedy, 632 F.Supp. 1415, 1418-19 (W.D. Okla. 1986) ("Regulations governing activities of distributors of child pornography may be viewed with greater constitutional scrutiny than those regulating activities of coercers and producers, because the latter are considered to regulate primarily conduct and only incidentally speech.")



The Massachusetts child pornography statute invalidated in this case, states in relevant part:

> Whoever. . . hires, coerces, solicits or entices, employs, procures, uses, causes, encourages, or knowingly permits such child to pose or be exhibited in a state of nudity or to participate or engage in any act that depicts, describes or represents sexual conduct for purpose of visual representation or reproduction in any book, magazine, pamphlet, motion picture film, photograph, or picture, shall be punished. . . .

Mass. Gen. Laws Ann. Ch. 272, §29A (West Supp. 1987).

The statute is directed toward the use of children in the production of pornography. Indeed, the indictment of Oakes was for "soliciting a child to pose for pornographic purposes." This Court's Ferber decision, as well as the great weight of authority from the lower federal courts and state courts, make

clear that the behavior essentially prohibited by Section 29A is criminal conduct which all states have a vital and constitutionally legitimate interest in preventing.

C. The Supreme Judicial Court Incorrectly Invalidated An Entire Criminal Statutory Scheme And Reversed Oakes' Conviction Because Marginal Applications Might Infringe On Speech Interests.

The Supreme Judicial Court struck down an entire criminal statute, vital to the state's interest in preventing child sexual abuse, on the grounds that an application of the child pornography statute to conduct the court viewed as clearly lawful, such as parental pictures of very young naked children running on the beach, was conceivable. Oakes, 401 Mass. at 605, 518 N.E.2d at



838. It is noteworthy in this regard that not a single application of the statute to this type of situation has ever been presented, and that the chilling effect feared by the majority is unlikely where, as the majority noted, "virtually every person would regard" the activity as lawful. Id., 518 N.E.2d at 838.

More importantly, the four-to-three majority's invalidation of the statute reflects a fundamental misunderstanding of the principle that "overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep." Broadrick, 413 U.S. at 615. (See section A infra).

The question is not, as the Oakes majority conceived it, whether the statute is susceptible to a troubling

application, or set of applications, but rather whether "these arguably impermissible applications of the statute amount to more than a tiny fraction of the materials within the statute's reach." Ferber, 458 U.S. at 773.[5/] The court below erroneously failed even to consider whether Section 29A defined a "central core of

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5/ As other courts have construed the post-Ferber substantial overbreadth requirement, it is immaterial if a statute may conceivably reach some instances of protected speech. "Defendant may be correct in saying that the literal language of the statute could be interpreted to embrace some protected speech, but this does not suffice to overturn a statute. There is no substantial overbreadth." United States v. Rogers, 755 F.2d 533, 543 (7th Cir.), cert. denied 473 U.S. 907 (1985); United States v. Reedy, 632 F.Supp. at 1421 (court rejected argument that 18 U.S.C. §2551(a) (Supp. 1984) is substantially



constitutionally regulable conduct." Ferber, 458 U.S. at 771, n.26.

In Ferber, this Court corrected a similar error by the New York Court of Appeals which had invalidated New York's child pornography legislation out of

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Footnote continued:

overbroad, even if some protected scientific or artistic expression is affected by statute); see People v. Holder, 96 Ill.2d 444, 454, 451 N.E.2d 831, 835 (1983) ("[A]ny such conceivable impermissible applications are dwarfed by the statute's legitimate reach in prohibiting threatened criminal activity."); State v. Lance, ___ Mont. ___, ___, 721 P.2d 1258, 1265 (1986) ("Although it might be possible that some rare situations will arise in the future,.... those possible unconstitutional applications of the statute are not sufficient to invalidate it on its face.").

concern that "some protected expression, ranging from medical textbooks to pictorals in the National Geographic would fall prey to the statute." Id. at 773. Despite expressing sympathy with the state court's concern in this regard, this Court held that any such potential overbreadth should be "cured through case-by-case analysis of the fact situations to which its sanctions, assertedly, may not be applied." Id. at 774.

In its short decision in this case, the Supreme Judicial Court four times indicates its view that whether Oakes could constitutionally be punished for his actions is an unresolved



question.[6/]

In failing to determine whether the statute could constitutionally be applied to the defendant, the court below omitted precisely the "case-by-case analysis" contemplated by this Court. The court's failure in this regard is particularly inappropriate because the statute clearly provides defenses for bona fide medical, scientific, educational or cultural purposes, a provision that was not present in the New York statute upheld in Ferber.

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6/ "We need not decide whether the Supreme Court would sustain a statute that was carefully directed against the defendant's conduct . . . . " 401 Mass. at 603, 518 N.E.2d at 837; "There is at least a substantial question whether an important governmental interest would warrant overriding First Amendment freedoms in this case . . . . " Id. at 604, 518 N.E.2d at 837; "Even if we

The court's failure to reach the merits of the case is, as a final matter, particularly disturbing in that Oakes' conduct in this case -- his taking of sexually suggestive nude photographs of his fourteen year old stepdaughter in secret -- bears no resemblance to a parent's frontal photograph of a small child "romping in a wading pool," 401 Mass. at 605, 518 N.E.2d at 838, and is conduct which the Commonwealth could properly criminalize.

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Footnote continued:

assume that an important governmental interest would justify punishment for the defendant's behavior in this case . . . . " Id., 518 N.E.2d at 837; "[E]ven if what the defendant did in this case could properly be criminalized (a matter we need not decide)." Id. at 605, 518 N.E.2d at 838.



## CONCLUSION

For the reasons stated, this petition should be granted. The Court is urged to review and reverse the decision of the Supreme Judicial Court.

Respectfully submitted,

JAMES M. SHANNON*
ATTORNEY GENERAL
COMMONWEALTH OF MASSACHUSETTS

John Pappalardo
Deputy Attorney General
Madelyn Wessel
Assistant Attorney General

One Ashburton Place, Rm. 2001
Boston, Massachusetts 02108
Tel.: 617-727-4538

*Counsel of Record

DATED: April 1, 1988

# APPENDIX A

APPENDIX A

COMMONWEALTH vs. DOUGLAS OAKES

Worcester,

February 3, 1987 - February 1, 1988

Present: Hennessey, C.J., Wilkins, Liacos, Abrams, Nolan, Lynch, & O'Connor, JJ.

Constitutional Law,
Freedom of Speech and Press

A person's conduct in permitting his stepdaughter, age fifteen, to pose, naked above the waste, for photographs he took of her in their home, was, in the circumstances, conduct and speech in the First Amendment sense; the provisions of G.L. c.272, §29A, that rendered such conduct criminal activity were unconstitutionally broad. [616-618] O'CONNOR, J., with whom NOLAN and LYNCH, JJ., joined, dissenting.

INDICTMENT found and returned in the Superior Court Department on January 9, 1985.

A pretrial motion to dismiss was heard by Robert V. Mulkern, J., and the case was tried before John J. Irwin, Jr., J.

SuZanne Worrell (Richard J. Vita with her) for the defendant.

Claudia R. Sullivan, Assistant District Attorney, for the Commonwealth.

WILKINS, J. We sustain the defendant's challenge to the constitutionality of the statute under which he was convicted. A jury found the defendant guilty of violating G.L. c.272, §29A (1986 ed.), which, among other things, makes a crime of knowingly permitting a child under eighteen years of age "to pose or be exhibited in a state of nudity...for purpose of visual representation or reproduction in any book, magazine, pamphlet, motion picture film, photograph, or picture...."[1/]

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1/ General Laws c.272, §29A (1986 ed.), in its entirety reads as follows: "Whoever with knowledge that a person is a child under eighteen years of age, or whoever while in possession of such facts that he should have reason to know that such person is a child under eighteen years of age, hires, coerces, solicits or entices, employs, procures, uses, causes, encourages, or knowingly permits such child to pose or be exhibited in a state of nudity or to participate or engage in any act that depicts, describes or represents sexual conduct for purpose of visual representation or reproduction in any book, magazine, pamphlet, motion picture film, photograph, or picture shall be punished by imprisonment in the state prison for a term of not less than ten nor more than twenty years, or by a fine of not less than ten thousand dollars nor more than fifty thousand dollars, or by both such fine and imprisonment.

(footnote continued)

The only evidence that arguably warranted a guilty finding showed that the defendant permitted his fifteen-year old stepdaughter to pose with her breasts exposed for photographs he took of her in their home. His stepdaughter was "in a state of nudity" as defined in

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(footnote continued)

> "It shall be a defense in any prosecution pursuant to this section that such visual representation or reproduction of any posture orexhibition in a state of nudity was produced, processed, published, printed or manufactured for a bona fide scientific or medical purpose, or for an educational or cultural purpose for a bona fide school, museum or library."

Section 29A was amended by St. 1987, c.294, §1. That amendment does not apply to this case and, if it did, it would not change the result.

G.L. c.272, §31 (1986 ed.).[2/] The defendant argues, relying solely on the First Amendment to the Constitution of the United States, that his conduct was protected speech. He finds support for his position in New York v. Ferber, 458 U.S. 747, 764-766 (1982). We need not decide whether the Supreme Court would sustain a statute that was carefully

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2/ General Laws c.272, §32 (1986 ed.), defines "nudity," for the purposes of §29A, as follows: "uncovered or less than opaquely covered post-pubertal human genitals, pubic areas, the post-pubertal human female breast below a point immediately above the top of the areola, or the covered male genitals in a discernably turgid state. For purposes of this defination a female breast is considered uncovered if the nipple or the nipple or areola only are covered. In the case of pre-pubertal persons nudity shall mean uncovered or less than opaquely covered pre-pubertal human genitals or pubic area."

directed against the defendant's conduct because we conclude that, in any event, §29A is unconstitutionally overbroad.

We start with a proposition that we would have thought not seriously debatable. Photography is a form of expression which is entitled to First Amendment protection just as the written or spoken word if protected. Photograph as a means of communication and expression can be strikingly informative, as in the works of Mathew Brady and Margaret Bourke-White. It can be inspirationally expressive, as Ansel Adams demonstrated. Although not every picture may be worth a thousand words, in a First Amendment sense a picture is worth at least one.

The defendant's conduct in permitting his stepdaughter to pose naked above the waist cannot fairly be isolated, therefore, for First Amendment purposes, from the expressive process of taking her picture. The circumstances involved at all times both conduct and speech in the First Amendment sense. First Amendment analysis does not severe conduct from speech. To do so would undercut the foundation of First Amendment protections. "A constitutional distinction between speech and conduct is specious. Speech <u>is</u> conduct, and actions speak" (emphasis in original). Henkin, The Supreme Court, 1967 Term -- Foreword: On Drawing Lines, 82 Harv. L. Rev. 63, 79 (1968). See <u>Griffin v. State</u>, 396 So. 2d 152, 158 (Fla. 1981) (Sundberg, C.J.,

dissenting in part); L. Tribe, American Constitutional Law §212-7, at 827 (2d ed. 1988); Ely, Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis, 88 Harv. L. Rev. 1482, 1494-1496 (1975).

In cases involving both "speech" and "nonspeech" elements, "a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitation on First Amendment freedoms." United States v. O'Brien, 391 U.S. 367, 376 (1968) (conviction of draft card burner upheld). See United States v. Albertini, 472 U.S. 675, 687-689 (1985). There is at least a substantial question whether an important governmental interest would warrant overriding First Amendment freedoms in this case. In their own home, the defendant took nonpornographic, nonobscene photographs of his fifteen-year-old, consenting stepdaughter who was nude above the waist, in circumstances where no commercial or even noncommercial distribution was intended or occurred.

Even if we assume that an important governmental interest would justify punishment for the defendant's behavior in this case, the defendant is correct in arguing that §29A is overbroad in its reach and that the overbreadth is substantial enough to warrant striking down §29A. See Broadrick v. Oklahoma, 413 U.S. 601, 615 (1973) ("where conduct and not merely speech is involved, we believe that the overbreadth of a statute must not only be real, but

substantial a well, judged in relation to the statute's plainly legitimate sweep"). Cf. New York v. Ferber, 458 U.S. 747, 773-774 (1982) (overbreadth insubstantial). The overbreadth of §29A is substantial. It criminalizes conduct that virtually every person would regard as lawful. Section 29A, for example, makes a criminal of a parent who takes a frontal view picture of his or her naked one-year-old running on a beach or romping in a wading pool.[3/] Surely the First Amendment protects that kind of activity, even if what the defendant did in this case could properly be criminalized (a matter we need not decide).

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3/ The artists who painted some of the world's greatest paintings engaged in behavior made unlawful under § 29A if they used child models.

The judgment is reversed and the verdict set aside. The indictment is to be dismissed.

So ordered.

O'CONNOR, J. (dissenting, with whom Nolan and Lynch, JJ., join). The court's analysis "start[s] with a proposition that [the court] would have thought not seriously debatable," namely, that photography is a form of constitutionally protected expression. I intend to address that proposition, but first I feel compelled to focus on a different proposition, a proposition that I would have thought not seriously debatable. That proposition, apparently questioned by the court, is that the State's legitimate interest in protecting children from exploitation extends to the type of exploitation that statutes, such as G.L. c.272, §29A, are designed to prevent.

In order that the State's interest may be better appreciated, the court's summary statement of the facts of this case needs fleshing out. The photographs, for which the defendant solicited, caused, encouraged, or permitted the minor victim to pose, are sexually provocative photographs of the type frequently found in magazines displayed by storekeepers in sealed cellophane wrappers. It is immaterial that they are not "obscene" within the Supreme Court's definition of that word. New York v. Ferber, 458 U.S. 747, 756 (1982). It is also immaterial whether they are characterized as pornographic or nonpornographic. Nothing turns on labels. It is only important that these sexually provocative, close-up, color

photographs portray a physically mature minor female in various positions atop a bar, clad only in a red scarf around her neck and bikini type white panties, and with her breasts exposed -- if not highlighted.

It matters not that the child "consented." I would have thought that proposition not seriously debatable.[1/] Nor does it matter that no commercial or even noncommercial distribution was intended, or that the defendant's motive in causing or "permitting" the child to pose for him bare breasted may have been gratification unrelated to money. In any event, the defendant's conduct, criminalized by G.L. c.272, §29A, constituted the abuse, exploitation, and degradation of a child. "The prevention of sexual exploitation and abuse of children constitutes a government objective of surpassing importance...The legislative judgment, as well as the judgment found in the relevant literature, is that the use of children as subjects of pornographic materials is harmful to the psychological, emotional, and mental health of the child." New York v. Ferber, supra at 757-758 & n.9.

The only real question in this case is whether soliciting, causing, encouraging, or permitting a child to pose nude (within the definition of nudity in G.L. c.272, §31) is a form of speech calling for First Amendment

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1/ The trial judge, at the time of sentencing, put it this way: "To suggest that a 15 year old girl can logically and intellectually submit herself for that kind of photography by her stepfather, is to me -- is to me an insult to anybody's intelligence."

analysis. More specifically, the question is whether the possible overbreadth of the statute is a relevant consideration in the decision of this case. The question of overbreadth is irrelevant if soliciting, causing, encouraging, or permitting a child to pose for photographs is not "speech" within the context of the First Amendment. New York v. Ferber, supra at 767-768. Broadrick v. Oklahoma, 413 U.S. 601, 610-612 (1973). Of course, the resolution of the question whether the prohibited conduct is also speech cannot properly be influenced by one's enthusiasm or lack of enthusiasm about the public interest involved.

Indeed, pictures, when displayed or disseminated, talk. It does not follow, however, that soliciting, causing, encouraging, or permitting someone to pose for a photograph is itself speech or is so inextricably bound up with the display or dissemination of a photograph that, for constitutional purposes, it must be treated as speech. As the court emphasizes, "no commercial or even noncommercial distribution was intended or occurred" in this case. The photographs were not designed to communicate, and the statute, focusing entirely on the adverse effect on the child of posing for nude photographs, irrespective of whether the photographs are ever shown to anybody, is entirely

neutral with respect to communication.[2/] The conduct proscribed by §29A, then, is only conduct, and not speech, and the overbreadth analysis engaged in by the court is inappropriate.

There appears to be no State or Federal decision directly or analogously supporting the court's conclusion that the defendant's conduct is also speech for constitutional purposes. Instead, the court relies on a dissenting opinion of the chief justice of the Supreme

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2/ It would make no difference if the defendant had taken the photographs for the purpose of disseminating them. A distinction must be made between the dissemination of a photograph, which ordinarily is speech, and the preliminary conduct involved in setting up the photograph. Causing someone to pose is no more speech then other required preliminaries such as manufacturing the film or the camera.

Court of Florida, on two law review articles, and on a treatise. The reliance on the law review articles and the treatise is misplaced. Professor Henkin, in his article, discusses United States v. O'Brien, 391 U.S. 367 (1968), a case in which the defendant burned his draft card to urge others to do the same thing. Henkin criticized the Supreme Court's pronouncemnt that "some kinds of conduct used to express an idea...are 'speech' protected by the first amendment, while others are not" (emphasis added). Henkin, The Supreme Court, 1967 Term -- Foreword: On Drawing Lines, 82 Harv. L. Rev. 63, 77 (1968). Henkin expressed his view that all kinds of conduct used to express an idea are speech. He directed his attention to picketing as well as draft card burning,

observing that "[i]n picketing...it is not solely or primarily the words that communicate; the presence of the pickets is itself a communication, and indeed picketing is often effective regardless of what the placards say, because even persons who never read the placards are reluctant to cross a picket line. And what would the Court make of silent pickets who carry no signs but whose presence effectively communicates a message?" Id. at 79.

It was in the context of discussing conduct that directly, immediately, and standing alone conveys a message, and is intended to do so, that Henkin wrote the sentences that the court quotes, ante at 617: "A constitutional distinction between speech and conduct is specious. Speech is conduct, and actions speak"

(emphasis in original). In context, it is clear that Henkin's point was that there is no valid constitutional distinction between the articulation of words and other conduct used to express an idea. As Henkin wrote, "[T]he meaningful constitutional distinction is not between speech and conduct, but between conduct that speaks, communicates, and other kinds of conduct. It if is intended as expression, if in fact it communicates, especially if it becomes a common comprehensible form of expression, it is 'speech.'" Id. at 79-80. Burning a draft card to express displeasure with government conduct or policy and picketing constitute conduct that speaks. However, soliciting, causing, encouraging, or permitting a child to

pose nude is not intended as expression; it does not communicate; it is not "a common comprehensible form of expression." Nothing in Henkin's article even remotely suggests that all conduct should be viewed as speech or that the type of conduct involved in this case is speech.

Similarly the other law review article cited by the court, Ely, Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis, 88 Harv. L. Rev. 1482, 1494-1496 (1975), provides no support for the court's position. As is apparent from the title of the article, the author's focus was on desecration of the American flag as a symbolic means of political protest. The article is about conduct used to express an idea. At least by implication, Professor Ely's article states the proposition that the type of conduct involved in this case, which by itself expresses no idea, should be considered pure conduct for purposes of constitutional analysis.

Professor Tribe's treatise, American Constitutional Law §12-7, at 825-832 (2d ed. 1988), should give the court no more comfort than do the law review articles. He, too, focuses on cases involving picketing and civil rights demonstrations and other forms of "nonverbal symbolic expression." Id. at 826. He observes that "[e]xpression and conduct, message and medium, are thus inextricably tied together in all communicative behavior; expressive behavior is '100% action and 100% expression'" (emphasis added). Id. at

827. Nothing in Tribe's treatise suggests that the defendant's conduct was communicative or expressive so as to permit an overbreadth argument, and treating it as such results in an unprecedented and inappropriate expansion of the overbreadth doctrine.[3/]

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3/ "The traditional rule is that a person to whom a statute may constitutionally be applied may not challenge that statute on the ground that it may conceivably be applied unconstitutionally to others in situations not before the Court. . . . What has come to be know as the First Amendment overbreadth doctrine is one of the few exceptions to this principle and must be justified by 'weighty contervailing policies.' United States v. Raines, [362 U.S. 17, 22-23 (1960)]. The doctrine is predicated on the sensitive nature of protected expression: 'persons whose expression is constitutionally protected may well refrain from exercising their rights for fear of criminal sanctions by a statute susceptible of appliction to protected expression.' Schaumburg v. Citizens for

(footnote continued)

Although there are no decisions supporting the court's view, there are decisions supporting my view. In State v. Helgoth, 691 S.W.2d 281 (en banc) (Mo. 1985), the defendant took posed photographs of a girl under seventeen, focused on her uncovered breasts and vagina. The pertinent statute made it unlawful to photograph a child under seventeen engaging in nudity, "if such nudity is to be dipicted for the purpose of sexual stimulation or gratification

of any individual who may view such

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(footnote continued)

a Better Environment, 444 U.S. 620, 634 (1980); Gooding v. Wilson, [405 U.S. 518, 521 (1972)]." (Citations omitted). New York v. Ferber, supra at 767-769.

depiction." Id. at 283. The court concluded that "the activity engaged in by the defendant and prohibited by the statute is distinctly conduct, as contrasted with speech. The offensive act is grounded in child abuse, and that is the epicenter of the case. The specific distinction to be made is between the use of children in the actual production of pornographic material and the ultimate dissemination of matrerials so produced." Id. at 284.

In Griffin v. State, 396 So. 2d 152, 155-156 (Fla. 1981), the defendant was charged with producing or directing obscene photos involving a minor and with procuring a minor for obscene photos, in violation of statue. The defendant's motion to dismiss attacking the constitutionality of the statute was denied, and the defendant appealed. The court affirmed (with Sundberg, C.J., dissenting), reasoning that "the statute in question does not proscribe constitutionally protected speech or activities, but prohibits specific conduct relating to minors. '[S]tates have greater power to regulate nonverbal, physical conduct than to suppress depictions or descriptions of the same behavior.'" Id. at 155, quoting Miller v. California, 413 U.S. 15, 26 (1973).

General Laws c.272, §29A, regulates conduct that is not speech. Soliciting, causing, encouraging, or permittng a minor to pose for photographs is no more speech than is setting a house afire in order to photograph a burning house.

Therefore, even if it were necessary to construe §29A as making "a criminal of a parent who takes a frontal view picture of his or her naked one-year-old running on a beach or romping in a wading pool," a doubtful proposition asserted by the court, the overbreadth of the statute is irrelevant. As applied to the defendant, the statute bears a reasonable relation to a permissible legislative objective, and it is constitutional. 4/

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4/ General Laws c.272, §29A (1986 ed.), provides that "[w]hoever . . . hires, coerces, solicits or entices, employs, procures, uses, causes, encourages, or knowingly permits [a] child to pose or be exhibited in a state of nudity or to participate or engage in any act that depicts, describes or represents sexual conduct for purpose of visual representation or reproduction in any book, magazine, pamphlet, motion picture film, photograph, or picture shall be punished . . . " (emphasis added). Even if overbreadth were an appropriate

(footnote continued)

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(footnote continued)

consideration and the statute were overbroad, the overbreadth relates only to that portion of the statute focusing on the causing or permitting of a child to pose in a state of nudity. The emphasized portion of the statute is certainly not overbroad, and the statute is clearly severable. Thus, in no event should the whole statute be ruled unconstitutional. The court's opinion fails to address this issue.

Supreme Court, U.S.
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NO. 87-1651

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

COMMONWEALTH OF MASSACHUSETTS,

Petitioner,

v.

DOUGLAS OAKES,

Respondent.

# SUPPLEMENTAL APPENDIX

JAMES M. SHANNON*
ATTORNEY GENERAL
COMMONWEALTH OF MASSACHUSETTS

John Pappalardo
Deputy Attorney General
Madelyn Wessel
Assistant Attorney General

One Ashburton Place, Rm. 2001
Boston, Massachusetts 02108
Tel.: 617-727-4538

*Counsel of Record

COMMONWEALTH OF MASSACHUSETTS

WORCESTER, SS.

SUPERIOR COURT
CRIMINAL ACTION
NO. 85-107246

COMMONWEALTH OF MASSACHUSETTS

vs.

DOUGLAS OAKES

MEMORANDUM AND ORDER ON
DEFENDANT'S MOTION TO DISMISS

## Background

The defendant is charged with Soliciting a Child to Pose for Pornographic Purposes, in violation of G.L. c. 272, §29A. Through this motion, he seeks to dismiss the indictment, stating as reasons therefore:

1) The indictment, as drawn, fails to include all language set forth in the statute;

2) the most important omission is the word "knowingly";

3) the Commonwealth has added a comma after "state of nudity" and before "or to participate" which does not appear in the statute and which substantially changes the nature of the crime or crimes alleged; and

4) the indictment, as written, fails to state the crime proscribed by G.L. c. 272, §29A.

In his Brief in Support of Motion to Dismiss the defendant argues that: 1) the statute is unconstitutionally vague, ambiguous and overbroad in its construction; 2) that it violates the Fifth Amendment of the United States Constitution as applied to the states through the Fourteenth Amendment because it requires that a defendant speculate as to the meaning of the statute; and 3) that it violates the equal



protection clause of the Fourteenth Amendment.

DISCUSSION

I. Constitutionality of the Statute

In determining the constitutionality of a statute, the courts will "indulge every rational presumption in favor of its validity and 'it will not be denounced as contrary to the constitution unless its language is so clear and explicit as to render impossible any other reasonable construction.'" Commonwealth v. Lammi, 386 Mass. 299, 301 (1982) quoting Commonwealth v. O'Neil, 233 Mass. 535, 540-541 (1919); See also Commonwealth v. Joyce, 382 Mass. 222 (1981); Globe Newspaper Co. v. Superior Court, 379 Mass. 846 (1980).

The language of G.L. c. 272, §29A is clear:

> Whoever with knowledge that a person is a child under eighteen years of age, or whoever while in possession of such facts that he should have reason to know that such person is a child under eighteen years of age, hires, coerces, solicits or entices, employs, procures, uses, causes, encourages or knowingly permits such child to pose or be exhibited in a state of nudity or to participate or engage in any act that depicts, describes or represents sexual conduct for purpose of visual representation or reproduction in any book, magazine, pamphlet, motion picture film, photograph, or picture shall be punished . . . .

The statute thus defines two distinct offenses: 1) with knowledge or reason to know that a child is under eighteen years of age, hiring, coercing, soliciting, enticing, employing, procuring, using, causing, encouraging or knowingly permitting that child to pose or be exhibited in a state of nudity for purpose of visual



representation or reproduction; and 2) with knowledge or reason to know that a child is under eighteen years of age, hiring, coercing, soliciting, enticing, employing, procuring, using, causing, encouraging or knowingly permitting that child to participate or engage in any act that depicts, describes or represents sexual conduct for purpose of visual representation or reproduction.

I find that G.L. c. 272, §29A proscribes clearly defined conduct and is thus not unconstitutionally vague or ambiguous and that it does not require a defendant to speculate as to its meaning.

I support of his claim that the statute is overbroad, the defendant argues that the definition of nudity in Section 31 of the statute is "so vast as to include many common everyday

occurrences including "a person taking a picture of his nude baby on a bear skin rug" and 'a child running up and down the beach on a summer day.'"

"The traditional rule is that a person to whom a statute may constitutionally be applied may not challenge the statute on the ground that it may conceivably be applied unconstitutionally to others in situations not before the Court." New York v. Ferber, 485 U.S. 747, 767 (1981).

The courts have applied on exception to this rule and have allowed persons to attack overly broad statutes, even though the alleged conduct of the person making the attack is clearly unprotected, in certain cases where persons whose freedom of expression is constitutionally protected "may well



refrain from exercising their rights for fear of criminal sanctions by a statute susceptible of application to protected expression" New York v. Ferber, supra at 768. This exception has been applied with hesitation, however, and courts have "insisted that the overbreath involved be 'substantial' before the statute involved will be invalidated on its face" New York v. Ferber, supra at 769.

Such is not the case here. Section 31 of G.L. c. 272 defines nudity as:

> uncovered or less than opaquely covered post-pubertal human genitals, pubic areas, the post-pubertal human female breast below a point immediately above the top of the areola, or the covered male genitals in a discernibly turgid state.

Applying this definition of nudity, the scenarios represented the defendant

could not result in a conviction under the statute.

I find therefore that the statute is not unconstitutionally broad.

The defendant also argues that, because the statute could include the previously mentioned potential situations, "enforcement, as done in the instant case is a denial of equal protection." The statute specifically excludes pre-pubescent children. There is no merit therefore to an argument that enforcement of the statute against the defendant, while failing to enforce the statute in situations involving pre-pubescent children, is a denial of equal protection.

II. Adequacy of the Indictment

The defendant contends that the indictment is defective and must be



dismissed because the word "knowingly" was omitted and because a comma was placed after the word nudity, thus eliminating from the indictment the element of the offense "for the purpose of visual representation or reproduction in any book, motion picture, film photograph or picture."

General Laws Chapter 277, Section 34 provides:

> An indictment shall not be dismissed or considered defective or insufficient if it is sufficient to enable the defendant to understand the charge and to prepare his defense, nor shall it be considered defective or insufficient for lack of any description or information which might be obtained by requiring a bill of particulars.

The indictment in this case tracks the exact language of the statute. The inclusion of the comma after the word

nudity appears to be a typographical error. While the misplaced comma could lead to a faulty reading of the necessary elements of the offense, the defendant has not been prejudiced in his defense thereby. The facts alleged against him include that he posed his fifteen year old stepdaughter in a state of nudity and took photographs of her, and that ten of the photographs taken have been recovered. The facts alleged therefore cover the three necessary elements of an offense including that the defendant posed his stepdaughter "for the purpose of visual representation or reproduction in a photograph." The defendant has been aware of this and has had the opportunity to prepare his defense accordingly. Similarly, the absence of



the work "knowingly" before the word "permit" in the indictment is of no consequence given the facts of this case and has resulted in no prejudice to the defendant.

I find therefore, that the defect in the indictment was immaterial and therefore does not require a dismissal of the indictment.

ORDER

It is hereby Ordered that the defendant's Motion to Dismiss be Denied.

Robert V. Mulkern
Justice of the
Superior Court

DATED: July 11, 1985

(3)

Supreme Court, U.S.
FILED
MAY 2 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-1651

In The

# Supreme Court of the United States

October Term, 1987

COMMONWEALTH OF MASSACHUSETTS,

*Petitioner,*

v.

DOUGLAS OAKES,

*Respondent.*

**On Petition for a Writ of Certiorari to the Supreme Judicial Court for the Commonwealth of Massachusetts**

## BRIEF IN OPPOSITION

RICHARD J. VITA
Counsel of Record

RICHARD J. VITA, P.C.
Jeffrey L. Baler
(on the brief)
2 Oliver Street
Ninth Floor
Boston, MA 02109
(617) 426-6566

May 2, 1988

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## QUESTIONS PRESENTED

I. DID THE COURT BELOW PROPERLY DEEM MASSACHUSETTS GENERAL LAW C. 272 §29A INVALID ON ITS FACE BECAUSE ITS SWEEPING PROHIBITION AGAINST NUDITY PER SE PERMITS COUNTLESS IMPERMISSIBLE APPLICATIONS TO THE PROTECTED CONSTITUTIONAL ACTIVITIES OF NUMEROUS OTHERS?

II. WHETHER MASSACHUSETTS GENERAL LAW C. 272 §29A RUNS AFOUL OF THE FIRST AMENDMENT OVERBREADTH DOCTRINE AS IT RELATES TO RESPONDENT?

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## STATEMENT OF THE CASE

On January 9, 1985, the appellant, Mr. Douglas Oakes, was indicted by a Worcester County Grand Jury and charged with posing a person under eighteen years of age for pornographic purposes in violation of Massachusetts General Law c. 272 §§ 29A, 31.

On March 21, 1985, Mr. Oakes filed with Worcester Superior Court, a Request to Report the issue of the constitutionality of the statute, to the Appeals Court of Massachusetts pursuant to Rule 24 of the Massachusetts Rules of Criminal Procedure. The appellant also filed a Motion to Dismiss the indictment on the grounds that the statute violated the Massachusetts and United States Constitutions. On July 16, 1985 the Superior Court denied the Motion to Dismiss and the Request for Report.

On October 10, 1985 Mr. Oakes was tried before a jury and found guilty. The following facts were presented to the jury:

The respondent, Mr. Douglas Oakes, is the stepfather of the complainant, Miss Laurie Supernor. In 1983, Ms. Supernor, at the age of fourteen (14), decided to pursue a modeling career. In that same year, she enrolled in LaFemmina Modeling School (Trial Tr. at 23) and thereafter entered several beauty pageants (Trial Tr. at 41,42). Ms. Supernor had pictures taken of her at the modeling school (Trial Tr. at 30). She also modeled at home where Mr. Oakes took photos of his daughter for the purpose of assembling a modeling portfolio (Trial Tr. at 30-31). Mrs. Oakes would also

take pictures of her daughter on occasion (Trial Tr. at 42).

This case centers around ten (10) photographs purportedly taken by Mr. Oakes in 1984. The photos show Ms. Supernor, then fourteen (14), sitting with her breasts partially exposed (Trial Tr. at 25, 29-30). These select photos which were introduced at trial do not display any private parts of the subject's lower body. The photos do not and were not argued by the Commonwealth to depict the subject engaged in any sexually explicit conduct or sexually suggestive act. All ten (10) photos show the subject in the same attire with her breasts partially covered (Trial Tr. at 25, 29-30).

On October 11, 1985 Mr. Oakes was sentenced to serve a term of imprisonment of ten years at Massachusetts Correctional Institute at Concord (M.C.I. Concord).

Both the evidence adduced at trial and the jury instructions given by the trial judge make clear that the appellant was convicted under the first proscribed offense-exhibiting a person under 18 years of age in a state of nudity (Trial Tr. at 101-104). The record is devoid of any evidence suggesting the minor was depicted or was engaged in sexually explicit conduct.

Further, even though the state of nudity which the subject was in was limited to the partial exposure of her breasts, the jury brought back a conviction after being instructed that nudity included the "uncovered post pubertal human female breast".



On November 7, 1985 a Notice of Appeal was timely filed to the Appeals Court of the Commonwealth of Massachusetts. This appeal was subsequently transferred, sua sponte, to the Supreme Judicial Court of Massachusetts.

On February 3, 1987 the case was argued before the Full Court of the Supreme Judicial Court of the Commonwealth of Massachusetts. On February 1, 1988 the Supreme Judicial Court reversed Oakes' conviction and dismissed the indictment holding that Massachusetts General Law c. 272 §29A was unconstitutionally overbroad.

## REASONS FOR DENYING THE WRIT

### I. GENERAL LAW C. 272 §29A IS OVERBROAD UNDER DOCTRINE SET OUT BY THIS COURT IN *NEW YORK V. FERBER*, 458 U.S. 747 (1982).

#### A. MASSACHUSETTS GENERAL LAW C. 272 §29A IS PROPERLY DEEMED INVALID ON ITS FACE BECAUSE ITS SWEEPING PROHIBITION AGAINST NUDITY PER SE PERMITS COUNTLESS IMPERMISSIBLE APPLICATIONS TO THE PROTECTED CONSTITUTIONAL ACTIVITIES OF NUMEROUS OTHERS.

The doctrine of overbreadth allows a litigant whose own activities are unprotected to challenge a statute by showing that it substantially abridges the rights of other parties not before the court. *Secretary of State of Maryland v. Munson*, 467 U.S. 947, 956-957 (1984),

*Village of Schaumberg v. Citizens for a Better Environment*, 444 U.S. 620, 634 (1980). Where First Amendment rights are at issue, a party generally has standing to challenge a statute as applied to other cases. *Broadnick v. Oklahoma*, 413 U.S. 601, 611 (1973). "[W]hen there is a danger of chilling free speech, the concern that constitutional adjudication be avoided whenever possible may be outweighed by society's interest in having the statute challenged". *Munson* at 956.

While this type of broad attack is limited where a statute regulates conduct as opposed to pure speech, *Broadnick* at 614-615, if the overbreadth is substantial in relation to the statutes' legitimate sweep, a broad attack is allowed. *Id.* at 615. "Criminal statutes must be scrutinized with particular care (cite omitted); those that make unlawful a substantial amount of constitutionally protected conduct may be held facially invalid even if they also have legitimate application". *City of Houston v. Hill*, 482 U.S. ___, 107 S.Ct. 2502, 96 L.Ed. 2d 398, 410 (1987).

The statute in question proscribes both conduct and pure speech. That is, the statute proscribes not only the physical taking of pictures but also the development and dissemination of such photos in traditional forms of speech such as books and films. *New York v. Ferber*, 458 U.S. 747, 771 (1982); *See also, e.g. Lerman v. Flynt Distributing Co., Inc.*, 745 F.2d 123 (2nd Cir. 1984) (magazine pictures pure speech); *Erznoznick v. City of Jacksonville*, 422 U.S. 205 (1975) (motion picture film pure speech). Thus the overbreadth of M.G.L. c. 272 §29A must be sufficiently substantial to warrant its invalidation.



The appellant submits that the overbreadth of M.G.L. c. 272 §29A as it incorporates §31 is so vast as to result in substantial suppression of constitutionally protected expression. The activity literally proscribed by the statute includes much that is completely lawful.

The statute in question prohibits

> "any person from hiring, coercing, soliciting, employing, procurring, using, causing, encouraging or knowingly permitting a person under 18 to pose or be exhibited in a state of nudity for purposes of representation or reproduction in a book, magazine, pamphlet, motion picture film, photograph or picture". M.G.L. c. 272 §29A.

The definition of nudity includes uncovered or less than opaquely covered human genitals or pubic area of a person under 18. M.G.L. c. 272 §31. These two provisions permit many impermissible applications of the statute, applications that significantly compromise traditional First Amendment activities. For instance, a parent who takes a picture of his child running up and down the beach without clothes on is in violation of the statute. Further, the mother who proudly stands by and watches the father take such a picture is literally "permitting" this picture taking and is also committing a criminal act. The statute would prohibit a police detective from taking a picture of a child murder victim laying naked on the floor. A child war victim, laying nude, shown in a 6 p.m. newsreel would fall within the definition of nudity.

The definition of nudity in the statute also includes the uncovered or less than opaquely covered post pubertal human female breast. M.G.L. c. 272 §31.

Puberty is defined as that period of life at which one becomes functionally capable of reproduction. *Taber's Cyclopedia Medical Dictionary* (13th ed. 1977). Puberty may occur from the ages of nine to sixteen in girls. *Id.* Thus, for purposes of the statute, a girl might be in post-pubertal stage anywhere between the ages of nine and seventeen. Thus, the statute would effectively prohibit a parent from taking a picture of a post-pubertal 11 year old without a bathing suit top on at the beach. It would prevent the display of the post-pubertal female breast in a magazine or movie picture regardless of the context in which the picture was taken. For instance, the statute would prohibit the filming of Brooke Shields in the movie "Blue Lagoon" in this Commonwealth. A professional model under the age of 18 who models less than "opaquely covering" lingerie might be considered in a state of nudity.

M.G.L. c. 272 §29A is unlike the New York statue in *Ferber*, where the court found that the "arguably impermissible application of the statute amount[ed] to . . . a tiny fraction of the material within the statute's reach. *Ferber*, 458 U.S. at 773. The Massachusetts statute sweeps more broadly because it does not require that the nudity be obscene, nor sexually explicit, nor lewd. It is therefore subject to the uncertainties and vagaries of prosecutorial discretion. *See Gooding v. Wilson*, 405 U.S. 518, 519 (1972).

While the narrow purpose of M.G.L. c. 272 §29A is legitimate, its chilling effect is to deter professional movie producers, photographers and even parents from taking pictures containing a person under eighteen (18) who is not completely clothed. These persons who have



heretofore exercised their constitutionally protected rights now run the risk of prosecution no matter how innocent or tasteful their activity. Because of this overbreadth, M.G.L. c. 272 §29A should be deemed invalid on its face.

### B. FIRST AMENDMENT OVERBREADTH IS AN APPROPRIATE REMEDY UNDER THE CIRCUMSTANCES OF THE PRESENT CASE.

Although the Massachusetts Supreme Judicial Court did not decide the issue in view of its determination of argument A above, the statute is also unconstitutional as it relates to Mr. Oakes.

The statute in question, Massachusetts General Law c. 272 §29A impermissibly restricts respondent's constitutionally protected speech. Therefore, the application of First Amendment overbreadth doctrine by the Supreme Judicial Court is warranted and appropriate. As previously stated the statute is primarily directed at traditional forms of first amendment activity and expression. *See, supra* at Page 4.

Because of the "inherent dangers of undertaking to regulate any form of expression," *Miller v. California*, 413 U.S. 15, 23 (1973), this Court has devised limits on what falls within the permissible scope of first amendment regulation. While a statute may proscribe what has been deemed unprotected speech, *see e.g. Chaplinsky v. New Hampshire*, 315 U.S. 568 (1972) (unprotected speech raises no constitutional question), the restriction cannot be so broad that it substantially restricts speech that retains first amendment protection. See *Village of Schaumburg v. Citizens for a Better*

*Environment*, 444 U.S. 620, 637 (1980). The appellant submits that M.G.L. c. 272 §29A, as it incorporates §31, is unconstitutional because in regulating unprotected expression, it has made protected expression the subject of a criminal offense.

For several years the guidelines enunciated in *Miller v. California*, 413 U.S. 15, were used as guidance in determining the appropriate line dividing protected from unprotected expression. *New York v. Ferber*, 458 U.S. at 753. If material was deemed legally obscene under the *Miller* test it was considered unprotected expression and thus subject to state regulations. *Miller v. California*, 413 U.S. 15.

In *New York v. Ferber*, this Court extended the category of unprotected speech to include *non-obscene* material depicting sexual conduct by children (emphasis added). *Ferber*, supra at 764. In *Ferber*, a bookstore proprietor was convicted for selling films depicting young boys masturbating under a New York statute which banned the distribution of non-obscene materials depicting sexual conduct by children. *Id.* at 749.

This Court was careful to point out, however, that "laws directed at . . . child pornography run the risk of suppressing protected expression by allowing the hand of the censor to become unduly heavy." *Id.* at 756. This Court concluded:

> There are of course limits in the category of child pornography which, like obscenity, is unprotected by the First Amendment. The nature of the harm to be combated *requires that the offense be limited to works that visually depict sexual conduct* by children below a specified age . . . (emphasis added). *Id.*



Thus, under *Ferber*, nudity not involving sexual conduct, even if children are involved, retained first amendment protection. Indeed, the test for child pornography assumes that sexual conduct is present. *Id.* at 764. Conversely, it is clear that material cannot legally be found to contain child pornography if there is no sexual conduct present. *See Note, Child Pornography and Unprotected Speech; Supreme Court, 1981 Term*, 96 Harv. L. Rev. 141, 149 (1982) (category of unprotected speech in *Ferber* is restricted to abusive and exploitative material or hard core child pornography).

The limited holding in *Ferber* does not tie the hands of the state legislature from proscribing the depiction of children in the nude unless the children are involved in some grotesque sexually deviate behavior. The lewd exhibition of the genitals is considered to represent the kind of conduct which a state may permissibly proscribe by including this conduct in its definition of sexual conduct. *Ferber*, 458 U.S. at 765, quoting from *Miller*, 413 U.S. at 25.

The pictures which led to the respondent's conviction are devoid of any act or pose, that can even remotely resemble sexual conduct. The subject is not engaged in any sexually explicit act, nor is the subject's genital area exposed. The pictures are of a nonsexual non-obscene semi-nude nature. The pictures cannot be considered "pornographic" under *Ferber*, since they contain nothing more harmful or more serious than nudity

*per se*. Indeed, the respondent's conviction is a quintessential illustration of "the hand of the censors becoming unduly heavy". *Ferber*, 458 U.S. at 756.

By enacting M.G.L. c. 272 §29A, the Massachusetts Legislature exceeded the constitutionally permissible scope of state regulation. The statute effectively turned a photograph containing semi-nudity without more into evidence of a criminal act. While pictures of the semi-exposed female breast of a person under eighteen (18) years of age may be distasteful to a legislature, the government may not censor what it subjectively finds offensive. *See Young v. American Mini Theatres*, 427 U.S. 50, 85-87 96 S. Ct. 2440 (1976); *Erznoznick v. City of Jacksonville*, 422 U.S. 205. If the statute's purpose is to prevent child pornography, the Massachusetts legislature could narrowly draft such a statute limited to, for example, lewd exhibition. Further, in Massachusetts dissemination of visual material of a child in state of nudity or sexual conduct is prohibited by M.G.L. c. 272 §29B which reads in part:

> Whoever disseminates any visual material that contains a representation or reproduction of any posture or exhibition in a state of nudity or of any act that depicts, describes, or represents sexual conduct participated or engaged in by a child who is under eighteen years of age, knowing the contents of such visual material or having sufficient facts in his possession to have knowledge of the contents thereof, or whoever has in his possession any such visual material knowing the contents or having sufficient facts in his possession to have knowledge of the contents thereof, with the intent to disseminate the same, shall be punished in the state prison for a term of not less than ten nor more than twenty years or by a fine of not less than ten



> thousand dollars nor more than fifty thousand dollars or three times the monetary value of any economic gain derived from said dissemination, whichever is greater, or by both such fine and imprisonment.

Thus, §29B greatly limits an individual's attempt at child pornography and renders prohibition of child pornography under §29A substantially repetitive.

Section 29A's proscription against semi-nudity *per se*, as is evidenced in the present case, is unconstitutionally overbroad because it absolutely proscribes conduct and speech which has heretofore been recognized as protected expression under the First Amendment.

Indeed, as Justice Wilkins of the Massachusetts Supreme Judicial court stated "It criminalizes conduct that virtually every person would regard as lawful. Section 29A, for example, makes a criminal of a parent who takes a frontal view picture of his or her naked one-year old running on a beach or romping in a wading pool." *Commonwealth v. Oakes*, 401 Mass. 602, 605, 518 NE 2d 836 (1988).

## CONCLUSION

For the reasons stated, the Petition for a Writ of Certiorari to the Supreme Judicial Court for the Commonwealth of Massachusetts should be denied. The Judgment of the Supreme Judicial Court should be upheld and affirmed.

RICHARD J. VITA
Counsel of Record

RICHARD J. VITA, P.C.
JEFFREY L. BALER
(on the Brief)

2 Oliver Street
Ninth Floor
Boston, MA 02109

Dated: May 2, 1988

SUPREME COURT, U.S.
FILED
JUL 21 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-1651

In The

# Supreme Court of the United States

October Term, 1988

COMMONWEALTH OF MASSACHUSETTS,

*Petitioner,*

v.

DOUGLAS L. OAKES,

*Respondent.*

## ON WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF THE COMMONWEALTH OF MASSACHUSETTS

## JOINT APPENDIX

JAMES M. SHANNON*
Attorney General

PHYLLIS N. SEGAL
A. JOHN PAPPALARDO
Deputy Attorneys General

MADELYN F. WESSEL
JUDY G. ZEPRUN
H. REED WITHERBY
Assistant Attorneys General
One Ashburton Place
Boston, Massachusetts 02108
(617) 727-2200

RICHARD J. VITA, ESQ.*
2 Oliver Street
Boston, MA 02109
(617) 426-6566

*Counsel of Record

**PETITION FOR CERTIORARI Filed April 1, 1988.**
**CERTIORARI Granted May 23, 1988.**

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
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# APPENDIX

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Commonwealth vs. Douglas L. Oakes
No. 85-107246

Offense: Soliciting A Child to Pose for Pornographic Purposes

Attorney: Penelope A. Kathiwala
340 Main Street
Worcester, MA

| DATE | | DOC. NO. | PROCEEDINGS |
|---|---|---|---|
| 1985 | | | |
| Jan. | 9 | 1 | Indictment |
| Mar. | 21 | 6 | Motion to Dismiss for Denial of Equal Protection and Unconstitutionality of the Statute, filed. |
| | | 7 | Request for Report under Mass. R. Crim. P. 34, filed. |
| | | 8 | Motion to Dismiss and Brief in support, filed in court. |
| Apr. | 3 | 9 | Memorandum in Opposition to Defendant's Motion to Dismiss, filed. |
| July | 16 | 10 | Memorandum and Order on Defendant's Motion to Dismiss be denied—(Mulkern, J.)—copy to D.A. & defendant's attorney. |
| Oct. | 10 | 12 | Verdict—Guilty |
| | | 11 | Sentence: 10 years M.C.I. Concord, credit 1 day chapter 279, section 33A (Irwin, J.) Mittimus issued—returned 12/6/85. |
| Nov. | 7 | 14 | Notice of Appeal, filed—notified D.A. and Judge Irwin Certificate of Order of Transcript. |
| 1986 | | | |
| Feb. | 7 | | Date of docketing in Appeals Court, A.C. No. 86-147. |

| | |
|---|---|
| May 1 | Appellant Oakes' Brief filed. |
| June 27 | Respondent Commonwealth's Brief filed. |
| Sept. 2 | Order of Supreme Judicial Court transferring case from Appeals Court. |
| 1988 | |
| Feb. 1 | Date of Decision. |
| Feb. 1 | Date of Rescript. |



85-107246

COMMONWEALTH

vs.

DOUGLAS L. OAKES

INDICTMENT.

SOLICITING A CHILD TO POSE FOR PORNOGRAPHIC PURPOSES

Worcester, ss. Superior Court, January Sitting A.D. 1985, Returned by Grand Jury. January 9, A.D. 1985 and filed by order of Court.

ATTEST,

/s/ John L. Connor
*Ass't. Clerk.*

85-107246

Commonwealth of Massachusetts
WORCESTER, ss.

*Superior Court Department of the Trial Court, holden at — Worcester, within and for the County of Worcester, for the transaction of criminal business, on the first Monday of January in the year of our Lord one thousand nine hundred and eighty-five.*

The Jurors for the Commonwealth aforesaid,
on their Oath Present

THAT Douglas L. Oakes of Leicester in said County of Worcester, on or about the first day of January in the year of our Lord one thousand nine hundred and eighty-four at Leicester in said County of Worcester, did with knowledge that a person is a child under eighteen years of age, or being in poseession of such facts that he should have reason to know that such person is a child under eighteen years of age, hire, coerce, solicit or entice, employ, procure, use, cause, encourage or permit such child to pose or be exhibited in a state of nudity, or to participate or engage in any act that depicts, describes or represents sexual conduct for purpose of visual representation or reproduction in any book, motion picture, film, photograph or picture.

A true bill,

/s/ (illegible)
*Foreman.*

/s/ (illegible)
*Asst. District Attorney.*



COMMONWEALTH OF MASSACHUSETTS
TRIAL COURT

| | | |
|---|---|---|
| Worcester, ss. | | Superior Court Department Criminal No. 85-107246 |
| COMMONWEALTH OF MASSACHUSETTS | ) | |
| vs. | ) | MOTION TO DISMISS |
| DOUGLAS OAKES<br>Defendant | ) | |

Now comes Douglas Oakes, Defendant in the above matter, and moves this Honorable Court dismiss the above indictment as failing to state a crime.

As reason for his request, the Defendant states that:

1) The indictment, as drawn, fails to include all language set forth in the statute;
2) The most important omission is the word "knowingly";
3) The Commonwealth has added a comma after "state of nudity" and before "or to participate" which does not appear in the statute and substantially changes the nature of the crime or crimes alleged;
4) The indictment, as written, fails to state the crime proscribed by M.G.L. C. 272 § 29A.

DOUGLAS OAKES, Defendant
by his Attorney,

/s/ Penelope A. Kathiwala
Penelope A. Kathiwala, Esq.
McGuire & McGuire
340 Main Street, Suite 910
Worcester, MA 01608
Tel. (617) 754-3291

COMMONWEALTH OF MASSACHUSETTS
TRIAL COURT

| | |
|---|---|
| WORCESTER, SS. | SUPERIOR COURT DEPARTMENT CRIMINAL |
| ) | NO. 85-107246 |
| COMMONWEALTH OF MASSACHUSETTS ) | |
| ) | REQUEST FOR |
| VS. ) | REPORT |
| ) | UNDER MASS. |
| DOUGLAS OAKES ) | R. CRIM. P. 34 |
| ) | |

Now comes the Defendant in the above entitled indictment and moves this Honorable Court, under the provision of Mass. R. Crim. P. 34 to report the issue of the constitutionality of M.G.L. c. 272 §§ 29A, 31 to the Appeals Court for determination.

As reason for his request, the Defendant states that:

1. The constitutional validity of these statutes is a case of first impression;
2. The statutes do not clearly indicate what conduct is proscribed and may, in fact, proscribe conduct commonly accepted in society;
3. A report may avoid the necessity of trial and appeal or dismissal;
4. The report represents a serious question of law which should be heard by the Appeals Court.



DOUGLAS OAKES, Defendant

By His Attorney,
/s/ Penelope A. Kathiawala
Penelope A. Kathiwala, Esq.
McGuire & McGuire
340 Main Street, Room 910
Worcester, MA 01608

COMMONWEALTH OF MASSACHUSETTS

| | |
|---|---|
| WORCESTER, SS. | SUPERIOR COURT DEPARTMENT CRIMINAL ACTION NO. 85-107246 |
| COMMONWEALTH OF MASSACHUSETTS<br><br>VS.<br><br>DOUGLAS OAKES | MOTION TO DISMISS FOR DENIAL OF EQUAL PROTECTION AND UNCONSTITUTIONALITY OF THE STATUTE |

Now comes Douglas Oakes, Defendant in the above entitled matter and moves this Honorable Court dismiss the above indictment as being violative of the Fourteenth Amendment to the United States Constitution and analoguous provisions of the constitution of the Commonwealth of Massachusetts.

As reason for this request the Defendant states that:

1. M.G.L. c. 272 § 29A is unconstitutional on its face as applied to the defendant, depriving him of his right to equal protection of the law as guaranteed by the Fourteenth Amendment to the Constitution of the United States;
2. M.G.L. c. 272 § 29A deprives the defendant of equal protection of laws because there is no rational *basis* for enforcement of the statute;
3. M.G.L. c. 272 § 29A, as it incorporates definitions contained in M.G.L. c. 272 § 31 violates both the provisions of the First and Fourteenth Amend-



ments and the Constitution of the United States and the provisions of Articles I and XVI of the Declaration of Rights of the Constitution of the Commonwealth because it is unlawfully vague and ambiguous and overbroad.

Wherefore, the Defendant requests this Honorable Court dismiss the indictment.

DOUGLAS OAKES

By His Attorney,
/s/ Penelope A. Kathiwala
Penelope A. Kathiwala, Esq.
McGuire & McGuire
340 Main Street, Room 910
Worcester, MA 01608

PARTIAL JURY INSTRUCTIONS, Tr. 100-104

* * *

(p. 100) The second phase of my instructions deal specifically with the law that is involved in this one indictment. And I want to take a moment, if I can, to read the relevant section of that particular chapter of our General Laws. You notice that I described it as General Laws, Chapter 272, Section 29A. Do you have to be concerned or remember those numbers? Obviously not. We have all of our laws, for the most part in Massachusetts, codified. In other words, there are enactments of the legislature, and they are compiled and placed in volumes, and the volumes are numbered. They are numbered and they are placed in certain statutes, and we use chapters and we use sections, and so on and so forth.

Well, this is General Laws, Chapter 272, (p. 101) Section 29A. And the relevant parts of that statute for your consideration in this case reads as follows:

"Whoever with knowledge that a person is a child under eighteen years of age, or whoever while in possession of such facts that he should have reason to know that such person is a child under eighteen years of age, hires, coerces, solicits or entices, employs, procures, uses, causes, encourages, or knowingly permits such child to pose or be exhibited in a state of nudity . . . . shall be punished."

Let me ready [sic] that statute to you again in its relevant parts:

"Whoever with knowledge that a person is a child under eighteen years of age, or whoever while in possession of such facts that he should have reason to know that such person is a child under eighteen years of age, hires, coerces, solicits or entices, employs, procures, uses, causes, encourages, or knowingly permits such child to pose or be exhibited in a state of nudity . . . shall be punished."



That is the relevant statute, ladies and gentlemen, which is operative in this trial. And with respect to those relevant provisions, the government has to prove those to you beyond a reasonable doubt.

So, with respect to this statute, what does the government have to prove to you beyond a reasonable doubt before they can expect that you will convict the defendant of (p. 102) this charge? Well, first of all, they have to prove that he knew that the child allegedly involved in these photographs was in fact under the age of eighteen, or he has to have been in possession of such facts that he should have reasonably known that the child was under the age of eighteen.

Number two, if in fact the government has proved that beyond a reasonable doubt, they then have to prove that he either hired, coerced, solicited, or enticed, employed, procured, used, causes, encouraged, or knowingly permitted that child to be photographed in the nude, or in a state of nudity as I am going to define that to you.

Now, you will notice that the statute sets out a series of ways in which the defendant could be convicted of this crime. That is, you will notice that those operative words, such as hired, coerced, solicited, or enticed, employed, procured, used, causes, encouraged or knowingly permits, are all in a fair reading of that statute there in the disjunc-

tive. So, if the government proves that he did any of those things, any of those things, and has proved the other elements of this statute, then you would be warranted in finding that the defendant had violated this statute. The government is not required to prove all of those. The government may prove any combination of them, but of course must prove beyond a reasonable doubt at least one of them.

(p. 103) Now, what about nudity. You will notice it says, "Whoever with knowledge that a person is a child under eighteen years of age, or whoever while in possession of such facts that he should have reason to know that such person is a child under eighteen years of age, hires, coerces, solicits or entices, employs, procures, uses, causes, encourages, or knowingly permits such child to pose or be exhibited in a state of nudity . . ."

Now, later on, ladies and gentlemen, in that same statute, there is what we describe as a definition of the terms that are relevant to this particular statute; and I am going to read that definition to you as it relates to that thing that we describe as "a state of nudity".

Nudity, among other things, for the purpose of this statute, includes the uncovered, post-pubertal, post-pubertal, p-u-b-e-r-t-a-l, that means afer puberty, after the age of puberty, uncovered, post-pubertal human female breast below a point immediately above the top of the areola, shall be nudity for the sake of this particular statute, shall meet the definition of nudity.

Let me repeat that to you again. "Uncovered post-pubertal human female breast below a point immediately above the top of the areola."



So, ladies and gentlemen, those are the relevant elements of this particular statute that the (p. 104) government has to prove to you by the evidence, by the facts, and the inferences that you might draw from the facts, before they can expect you to convict the defendant. If the government has proved those allegations to you beyond a reasonable doubt, the government is entitled to have a verdict. If they have failed, then the defendant must be acquitted.

The statute provides, of course, that it is not a crime if in fact that nudity—and I want to take a moment to read this to you, if it appears that the, ". . . state of nudity was produced, processed, published, printed or manufactured for a bona fide scientific or medical purpose, or for an educational or cultural purpose for a bona fide school, museum or library," then in those circumstances, such nudity or depiction of nudity, would not be a crime.

So, the government, of course, based upon the evidence and all the inferences that you might draw from the facts established, has to prove beyond a reasonable doubt based on the evidence that you have heard, if there was any visual representation or reproduction of this girl under the age of eighteen in a nudity state as I have described that to you, but they would have to prove that it was not produced for an education or cultural purpose, or for a scientific or medical purpose.

PARTIAL TRIAL TRANSCRIPT, pp. 17-57

* * *

(p. 17) (Commonwealth's Opening Statement)

Mr. Ball: Thank you, your Honor. Madam Forelady, members of the jury, for the Commonwealth principably the evidence is going to come from one witness, her name is [L] [S], she lives in Leicester, and she is sixteen years old. She will tell you that Douglas Oakes was her stepfather at the time of the picture taking. She will tell you that they were living in Leicester, her mother lived there, Cynthia Oakes is her name. She had a brother and a couple of younger siblings. That they all lived out at 9 Ingram Road in Leicester.

That some time in September or thereabouts of 1983, she began modeling school. She was going to normal school or regular school, she also went to this modeling school here in Worcester, and she would have pictures taken there, and she will tell you she also did some modeling at home, and this was all at the suggestion of her stepfather, Douglas Oakes.

She will tell you in September and October, and November, into December, a series of pictures were taken by Douglas Oakes in various stages of dress, and various different articles of clothing she was wearing. Costumes, that type of thing, bathing suits, robes, things like that.

(p. 18) She will tell you that in January, on or about January 1st, some time in the early part of January, Douglas Oakes began taking pictures, and on one particular occasion he took pictures downstairs in the basement



of their house, or home, at 9 [sic] Ingram Road in Leicester; and she will describe the home, and she will tell you there was a bar in the basement area, it is affixed over the basement, and she was on the bar. She will tell you that she wasn't wearing anything but a pair of briefs, and a red scarf, and the rest of her body was nude. That Douglas Oakes was the only person in the house at the time the pictures were taken. And that he took a series of photographs of her.

She will tell you that those photographs she later saw in another occasion, and she ripped them up. Not totally, but she ripped them in half. And you will see those pictures that she had, and you will see the exact position that she was in. And she will tell you that Douglas Oakes is the one that posed her in those particular positions and took those pictures of her in the state of nudity, or partially nude.

That will be the evidence on behalf of the Commonwealth. At the conclusion of the evidence, all of the evidence, you will listen to the defense as well, be fair, you decide the case, decide the fact, and at the end of the trial the judge will instruct you on what the law is. You (p. 19) apply those facts of the law, and when you do, the Commonwealth will be requesting that you find the defendant, Douglas Oakes, guilty of this indictment. Thank you.

The Court: Ms Kathiwala.

(Defendant's Opening Statement)

Ms Kathiwala: Ladies and gentlemen of the jury, I would just be very brief in my opening. There is two things essentially that I would like to tell you. One is

that—and you all know that there is two sides to every story, or that the story that you may hear may be interpreted in many different ways, and that is one of the things I would like you to keep in mind throughout the course of this trial.

The other basic thing I would like to tell you about this is not too often in the case does the Commonwealth and the defense have the same major star witness, and this just happens to be one of those cases. We, the defense or the defendant, intends to show essentially what Mr. Ball has pointed out, but to show a few more, or different facts or facets of this case for you to keep in mind when you are deliberating about the law, and what the law is regarding posing in nudity by minors, and maybe perhaps what the intent of that law was.

But very briefly, what we hope to bring out, or show through the defendant's case, which will be partially put through using the Commonwealth witness, is that [L] (p. 20) [S] is, as she will testify, the stepdaughter of Mr. Oakes, and that she has lived with him for some twelve or fourteen years of her life. And we hope that she will also testify that some time in 1982, in the fall of 1982, and the spring of 19——strike that. The fall of '82 and the winter or New Year's of 1983, she entered into several contests, Miss Teen Magazine, she went on to different other contests, several of them, went to one at the Sheraton Lincoln, a beauty pageant which she won. She will also testify, I believe, she was on the Good Morning America show as a result of one of these beauty pageants and teen shows. And that she also not only did she attend modeling school, she attended dancing school. And



although you will see ten pictures of her in a partial state of nudity, we hope to show there were hundreds upon hundreds of photographs taken of her in all different types of outfits, modeling outfits, different clothing, what have you. And that not only did Mr. Oakes take some photographs of her, but Mrs. Oakes took photographs of her.

We hope to show also through the testimony on the defendant's side of the case, that after these photographs over a two and half year period of time were taken, ten of which you will see out of hundreds, that we allege were taken, an interesting thing happened. Some time in February of 1984, Miss [S] will tell you, "Well yes, (p. 21) those ten nude photographs were taken." And then in September, 1984, some nine or so months later, her mother filed for divorce against Mr. Oakes. And she will also testify that after September of '84, some nine months after the alleged photographs were taken, this complaint in November of 1984 was brought.

After hearing all of that evidence from the defendant's point of view, and after the Commonwealth and defense make our appropriate arguments—again, this is just an opening, an outline of the case, as the judge said—you will be instructed on some law. But remember, there are two sides to every story, and there are all facets of a tale that one has to hear before one can make a decision. So, please, keep an open mind. Thank you.

Mr. Ball: May I proceed, your Honor?

The Court: Yes.

Mr. Ball: Commonwealth calls [L] [S] to the stand.

[L] [S], a witness for the Commonwealth, was sworn and testified upon her oath as follows:)

DIRECT EXAMINATION

BY MR. BALL:

Q. You state your name, please?

A. [L [S].

Q. Where do you live?

(p. 22) A. 31 Ingram Road, Leicester.

Q. Who do you live there with?

A. My mother, Cynthia Oakes, my brother, Michael [S] and Lisa and David Oakes.

Q. How long have you lived there?

A. Eight years approximately.

Q. How old are you?

A. 16.

Q. What is your date of birth?

A. July 14, 1969.

Q. Do you recall where you were living in September of 1983?

A. Yes. 31 Ingram Road.

Q. Who was living with you there at that time?

A. All the same people, including Doug Oakes.

Q. Person you say is Doug Oakes, he is here today?

A. Yes.



Q. Where is he?

A. Sitting right there.

Q. How do you know him?

A. He is my stepfather.

Q. How long has he lived at your household?

A. Approximately seven years (crying).

Q. In September of 1984, did you begin some type of schooling?

A. Yes. Modeling school.

Q. At whose suggestion was that?

(p. 23) A. Doug's.

Q. Is that the first time that you had gone to this modeling school in September of 1983?

A. Yes.

Defendant Oakes: (Crying).

Q. Prior to that, had you attended any beauty pageants or anything like that?

A. Not before that till I attended modeling school.

Q. Where was that modeling school?

A. In Worcester on Park Ave, the LaFemmina Modeling School.

Q. How long did you attend that school?

A. Approximately a year.

Q. Is that a one-day thing a week or afternoon?

A. One day a week thing at nighttime.

The Court: When was that date again?

Q. Was that September of 1983?

A. Yes.

Q. How long did you attend that school?

A. Approximately a year.

Q. A year?

A. Yes.

Q. Till September of 1984?

A. Yes.

Q. During the course of that time—strike that. Between September, 1983, and January of 1984, did you do any other (p. 24) modeling besides modeling you did at the LaFemmina School?

A. Yes.

Q. What modeling was that?

A. Pornographic pictures, nude pictures.

Q. Did you do any other modeling?

A. Prior to modeling at the LaFemmina?

Q. Prior to January, between September and December, did you do some modeling? Were pictures taken of you?

A. Yes.

Q. Who took those pictures?

A. Doug Oakes.

Q. And between September and December of 1984, what type of pictures were taken?



A. Pictures with the jeans on, and body suits, and then went to nothing.

Q. About how many approximately? How many pictures were taken would you say?

A. I would say—

Q. More than a hundred?

A. Yes.

Q. More than two hundred?

A. Yes, sir.

Q. And some time in January of 1984, do you recall being in the basement of your house?

(p. 25) A. Yes.

Q. Who were you with in the basement of your house?

A. Doug Oakes.

Q. Can you describe the basement?

A. Yes. You go down my cellar stairs, to the left of you is a bar, in front of you is our living room set, to the right of you is the wash room.

Q. Downstairs the basement is a finished room?

A. Yes.

Q. Do you remember when that was in January? The first part of January, the latter part of January that you were down in the basement?

A. I would say during the middle of January.

Q. Who did you go there with, down into the basement with?

A. Doug Oakes.

Q. What happened when you went down into the basement?

A. Nude pictures were taken of me.

Q. Do you remember what you were wearing?

A. Yes. Red scarf and red and white striped underwear.

Q. Did you have anything else on?

A. No.

Q. How were those pictures taken?

A. On top of the bar.

Q. You got on top of the bar?

A. Yes.

(p. 26) Q. Is that at anyone's suggestion?

A. Yes.

Q. Whose?

A. Doug's suggestion.

Q. When you sat on the bar, what happened as soon as you sat on the bar?

A. Pictures were taken of me.

Q. Were you just sitting there on the bar?

A. I had to pose.

Q. How did you pose?



A. Numerous of ways.

Q. How did you determine which way to position yourself?

A. Cause Doug told me to turn a certain way.

Q. There was no one else in the room?

A. No.

Q. When you did turn a certain way on that occasion in January on the bar, he would do something?

A. Yes. He would take pictures of me.

Q. Some time after that session in your basement, the basement of your house, did you see some photographs?

A. Yes.

Q. Were they the photographs of that day?

A. Yes, they were.

Q. Did you do something with those photographs?

A. Yes.

(p. 27) Q. What did you do.

A. I ripped them up and I threw them in the back of the woods.

Q. Some time after that, did you see Douglas Oakes?

A. Yes, I did.

Q. After ripping up the photographs, where did you go?

A. I was over my girlfriend [C] [L]'s house.

Q. Did you see someone besides your girlfriend over there?

A. Yes.

Q. Who was that?

A. Doug.

Q. What happened when he came over?

A. He picked me up from [C]'s house, brought me home, and made me find the pictures in the back of the woods.

Q. You went out into the woods with him?

A. Yes.

Q. Was there any one else there?

A. No.

Q. When you went out into the woods, what did you do?

A. I had to find all of the pictures.

Q. You picked up some pictures back there?

A. Yes.

Q. What did you do with the pictures then?

A. We picked them up and we had to put them on the kitchen table and laid them out so they could dry.

Q. Was there any one else home at that time?

(p. 28) A. No.

Q. Did he say anything to you as you laid them out on the dining room table or kitchen table?

A. Yes. He asked me why I ripped them up.

Q. What did you say?



A. I told him I ripped them up because I didn't want them.

Q. What did he say?

A. "That cost a lot of money." He wanted to make me big for Playboy Magazine.

Q. Now, during that—at that time when you ripped up the pictures and he said that to you, was he still living at 19 Ingram Road?

A. 31 Ingram Road. Yes, he was.

Q. He was?

A. Yes.

Q. Some time after that, he and your mother were divorced now; is that right?

A. Yes.

Y. Some time after you saw the pictures drying out on the table at 31 Ingram Road, did you see them again, those same pictures?

A. Yes.

Q. Were they in a—what condition were they in when you saw them the next time?

A. They were ripped in half.

(p. 29) Q. You had done that?

A. Yes, I had.

Q. On the day that it was raining or damp out; is that right?

A. Yes.

Mr. Ball: May I approach the witness, your Honor?

The Court: Yes.

Q. I show you these photographs and ask you if you recognize them?

A. Yes. That is me.

Q. I will show you ten photographs. The first one you recognize?

A. Yes.

Q. The second one?

A. Yes.

Q. The third one?

A. Yeah.

Q. Fourth?

A. Yes.

Q. Fifth?

A. Yes.

Q. Sixth?

A. Yes.

Q. Seventh?

A. Yes.

(p. 30) Q. Nine?

A. Yeah.

Q. And ten?



A. Yes.

Q. Those are photographs that were taken on that day in the basement of your apartment?

A. Yes.

The Court: Have you seen those?

Ms Kathiwala: I have, Judge. No objection.

Mr. Ball: I would offer these ten photographs, your Honor.

The Court: All right. Do you have any objection to them being marked as one exhibit?

Ms Kathiwala: No Judge.

The Court: All right.

*(Exhibit No. 1—See Index)*

Mr. Ball: Proceed, your Honor?

The Court: Yes.

Q. Now, during the entire time that—between September and January of 1984, was any one else taking photographs of you besides the defendant and whoever was at LaFemmina School?

A. Yes.

Q. Who was that?

A. Peter Sims, my photographer from the LaFemmina Modeling School.

(p. 31) Q. Besides he and Douglas Oakes, any one else?

A. No.

Q. Did your mother ever take pictures of you at all?

A. No.

Q. Did your mother have a camera?

A. Nope.

Q. Did you have a camera?

A. No.

Mr. Ball: I have no further questions.

CROSS-EXAMINATION

BY MS KATHIWALA:

Q. Now, [L], are you sure your mother never took any photographs of you; is that correct?

A. Positive.

Q. Never took any at all?

A. Never.

Q. Now, [L], when you enrolled in the LaFemmina Modeling School, had you already submitted any applications to the Miss Teen America contest prior to that time?

A. No, not that I remember.

Q. You never entered into any contest submitting photographs prior to going to the LaFemmina Modeling School?

A. No. I started at the LaFemmina Modeling School first before the pageant.



Q. When did you start the Joanne Giguere Dance School?

(p. 32) A. I don't remember

Q. Was it during the same year?

A. Yes.

Q. And be fair to say that would be in 1983 you started the dance lessons?

A. Yes.

Q. By the way, you lived with your mother during that time; isn't that correct?

A. Yes.

Q. And your mother knew that you had all of these photographs taken of you by Douglas Oakes?

A. Not at the time, no, she didn't.

Q. So, it is your testimony that your mother never knew that he was taking all of those photographs of you; is that correct?

A. Yes.

Q. And let me ask you this. Did you ever see any photographs of you in a photo-album?

A. Yes.

Q. And it is your testimony your mother still never saw photographs of you?

A. Yes, she did, in the photo-album.

Q. And how many photographs would you say Mr. Oakes took of you starting in September of '83 and going up to February of '84 or after?

(p. 33) A. I would say approximately over 400 pictures.

Q. And where were the majority of these photographs taken?

A. In my basement at 31 Ingram Road on the bar and off the bar, standing aside of it.

Q. It is fair to say that is the family room, isn't it?

A. Yes.

Q. And the two little brothers and sisters, and your brother, Michael, they live with you, too, don't they?

A. Yes, they do.

Q. They come home from school during the day?

A. Yes, they do.

Q. Now, when did you enter into that pageantry at the Sheraton Lincoln Hotel?

A. I have no idea. I have been in many pageants.

Q. Well, isn't that the pageant that you won, the one at the Sheraton Lincoln?

A. I have never won any pageant.

Q. Can you tell us when you were on the Good Morning America show, what month and what year?

A. Approximately a year and half ago.

Q. What year would that have been, if you can remember?

A. End of 1984.



Q. Before or after those photographs, photographs without—

A. During.

Q. During that time?

(p. 34) A. Yes.

Q. Did your mother know you were on the Good Morning America show?

A. Yes, she did.

Q. And did your mother know that you were doing modeling or trying to be a model?

A. Yes.

Q. And it is fair to say that is the occupation that you wish to pursue?

A. Yes.

Q. And are you taking any other classes or dance-lessons to pursue that now?

A. No.

Q. Now, you testified that you found those photographs, those nude photographs in October or November; is that correct?

A. Yes.

Q. That is when you say you saw them?

A. Yes.

Q. And you testified that he took them in January or February of '84; is that correct?

A. Yes.

Q. So, the only time you ever saw them was ten months later; is that correct?

A. No. Doug showed me them earlier than that, after they came out of the Photo-Mat store.

(p. 35) Q. And you never saw them again; isn't that correct?

A. Exactly.

Q. You know if your mother saw them?

A. No, I don't.

Q. Your mother never talked to you in July of 1984 about the pictures?

A. She asked me what was going on, and I lied to her, and I told her nothing was going on.

Q. So, you told her nothing?

A. Yeah.

Q. And she said nothing?

A. She said, "I feel that something is going on, [L]," and I said, "There is nothing going on."

Q. Okay. So, she never showed you any pictures in July of '84; is that correct?

A. Exactly.

Q. That were in the bedroom closet?

A. No.

Q. Now, you said that you found those pictures in October or November of '84. You also just testified that Mr. Oakes was living in Leicester; isn't that correct?



A. Yes.

Q. You weren't living there though, were you, ma'am?

A. No.

Q. And your mother wasn't living there, was she?

(p. 36) A. No.

Q. Neither were your brothers and sisters, were they?

A. Right.

Q. They had all left; isn't that correct?

A. Yes.

Q. And your mother had already filed for divorce; isn't that correct?

A. Yes.

Q. Some time in November you brought these pictures to Officer Berry of the police department, didn't you?

A. Yes.

Q. Did you bring here any of your other photo-albums with the hundreds of pictures that were in them?

A. No. Because I didn't have any. He took them.

Q. Ma'am, please answer my questions. Don't elaborate. Did you bring those with your mother?

A. Yes.

Q. Who had those pictures, you or your mother?

A. Neither one of us did. They fell out of the ceiling.

Q. Fell out of the ceiling?

A. Yes. From downstairs in my basement. We have pop up ceilings, and they fell out, and my brother found them.

Q. And it is your testimony, ma'am, other than Peter Sims of the LaFemmina Modeling Studio, and people at LaFemmina, and Mr. Oakes, no one else took any pictures of you; is (p. 37) that correct?

A. Right. No one took any pictures of me.

Q. And your mother never knew anything about all of this?

A. She knew I was into modeling. But she never took any pictures of me.

Q. Never did?

A. Never.

Ms Kathiwala: Nothing further.

Mr. Ball: Just a couple on redirect, your Honor.

The Court: Go ahead.

REDIRECT EXAMINATION

BY MR. BALL:

Q. When you say your mother didn't know about the pictures, you are referring to the nude pictures?

A. Exactly.

Q. She did know about all the ones in the bathing suit and the dresses, and the jeans and all of that?



A. Yes.

Q. The photo-album; is that correct?

A. Yes.

Q. When was the last time you saw those hundred or so pictures that Douglas Oakes took of you in the jeans and the nightgown, and that type of thing?

A. Well over a year.

(p. 38) Q. Where were they the last time you saw those?

A. Underneath my chest in my parlor, that is where they were kept.

Q. Did you at some time learn that Doug Oakes had those photographs?

A. Yes.

Q. Did you ask him for them back?

A. Yes.

Q. Did you get them back?

A. No.

Q. Have you still tried to get them back?

Ms Kathiwala: Object.

The Court: She can testify to that.

Q. Have you tried to get them back?

A. Yes. And I can't get them back. I don't know why.

Mr. Ball: I have no further questions of the witness.

The Court: Anything else?

Ms Kathiwala: Nothing further, your Honor.

The Court: All right. Thank you. We'll stop and take a brief, just a brief recess, five or ten minutes, and we will pick the trial up.

(MORNING RECESS)

(p. 39) (Reconvened at 12:20 P.M.)

The Court: Please be seated.

Mr. Ball: Your Honor, the Commonwealth rests.

The Court: All right.

Ms Kathiwala: May I proceed, Judge?

The Court: Yes.

Ms Kathiwala: Like to call Cynthia Oakes to the stand.

(CYNTHIA OAKES, A WITNESS FOR THE DEFENDANT, WAS SWORN AND TESTIFIED UPON HER OATH AS FOLLOWS:)

BY MS KATHIWALA:

Q. Mrs. Oakes, for the court, would you state your name and address?

A. Cynthia Oakes, 31 Ingram Road, Cherry Valley, Mass.

Q. Ma'am, you are the mother of [L] [S]?

A. Yes, I am.

Q. And are you formerly married to Mr. Douglas Oakes?



A. Yes, I was.

Q. And how long were you married, ma'am?

A. Eight years.

Q. And how long had you lived with Mr. Oakes?

A. Thirteen and half years.

Q. Thirteen and half years?

A. Yes.

Q. And did your children, [L] [S] and [M] [S], (p. 40) live with Mr. Oakes along with you those thirteen and half years?

A. Yes, they did.

Q. And some time, ma'am, you filed for divorce. Do you recall when that was?

A. Yes.

Q. Do you know the month?

A. Yes. September.

Q. Of what year, ma'am?

A. '84.

Q. Now, drawing your attention to some time around September of 1983, do you recall if your daughter, [L] [S] started attending modeling school?

A. She had attended a modeling school, yes.

Q. And do you recall if some time during that year she went and had some photographs taken at the office of a Mr. Sims?

A. Yes. But not in his office. His office is in the modeling school. It is at LaFemmina. He doesn't have a separate office.

Q. And do you recall if it was you who called to make the appointment?

A. It could have been. I am not sure. Yes, in fact, I think it was, because Karen Shea had suggested it.

Q. And do you recall if it was you, ma'am, who enrolled [L] in the Joanne Giguere Dance School?

(p. 41) A. Yes, I think it was.

Q. Do you recall when that was?

A. End of '83. I think it was the end of '83. Because she was in some kind of a recital. I think the end of the year or the beginning of '84. I think it was the end of '83.

Q. And do you recall, ma'am, if Miss [S], prior to entering the LaFemmina Modeling School, had enrolled in any beauty pageants?

A. Yes.

Q. And when was that? What year did she start enrolling in the beauty pageants?

A. It was the beginning of—it was August of '83 or August of '82. I am not sure. She enrolled in a Miss Teen America Pageant.

Q. Before she went into the modeling school or the beauty school?

A. Yes.



Q. And did you ever accompany her to any of these pageants?

A. Yes.

Q. And did you go alone or did you go with any one else, besides [L]?

A. We went with Doug Oakes.

Q. Did you ever bring any of your other children?

A. The first one, no. They came at the end.

(p. 42) Q. Do you recall going with her to the Good Morning—when she was on the Good Morning America Show?

A. Yes.

Q. And were you alone or with any one else besides [L]?

A. Doug Oakes.

Q. Now, during the time—strike. Do you know how many beauty pageant shows your daughter entered?

A. About three, maybe four.

Q. And during that time, Mr. Oakes was taking photographs of her; is that correct?

A. Yes.

Q. And during that time, ma'am, were you ever taking any photographs of her?

A. I didn't take any photographs of her. On occasion when Doug Oakes would take photographs, I was there for her portfolio. They say that they needed certain outfits, certain clothing, skirts, dresses.

Q. So, you never used a camera and took any photographs; is that correct?

A. Not for [L]'s portfolio, no.

Q. How about [L] just modeling or doing some posing?

A. Yeah, a couple in her gown to see how it looked.

Q. Well, I would ask you, ma'am, if you recall ever taking any photographs of what would be considered the flash dance pose?

(p. 43) A. No, I didn't take those pictures.

Q. Did you ever take any pictures like that?

A. No.

Q. Did you ever take any photographs of [L] in black and white color?

A. I don't understand?

Q. Rather than—

A. Black and white clothes?

Q. Black and white, the picture of black and white?

A. Picture of black and white. Oh, maybe a couple, but not a full roll of film. Maybe just a couple to see how they would come out. Because Mr. Sims had suggested that the black and white is better for a portfolio than color.

Q. So, in any event, you took some black and white, and you took some colors; is that correct?

A. Right. But in a complete roll, one or two.



Q. And where would you take these photographs, ma'am? Would they be in any particular room in the house?

A. Yeah. The parlor.

Q. And where is the parlor? Is that the downstairs room?

A. No, upstairs.

Q. Did you ever take any photographs downstairs in the family room, bar area?

A. No.

Q. Never did?

(p. 44) A. No.

Q. Did you ever view any photographs taken down there? In other words, were you ever present when photographs were being taken with [L] down there?

A. Once.

Q. And that was during the year 1983 and '84?

A. Right.

Q. And at some time, ma'am—well, strike that. Did you ever have discussions or occasions to have conversation with Mr. Oakes about [L]'s modeling career, yes or no?

A. Yes.

Q. And did you ever have any conversation with [L] about her being a model?

A. Yeah.

Q. And how many times, or over that period of a year, how many times would you discuss her becoming a model?

A. With who?

Q. [L].

A. Whenever the sun came up, when ever she or I got into the discussion of her modeling, and does she want to attend any more classes, does she think she had enough classes. It would be a few times.

Q. And did she ever win any one of these pageants?

A. No, she won a scholarship.

Q. Was that the Medfield Pageant Scholarship that she won?

(p. 45) A. No. It was the Sheraton—maybe it was Medfield. It was at the Sheraton. I can't remember what town it was in, but off of 495, I guess.

Q. Did you go with her to these pageants?

A. Yes.

Q. Were most of these Miss Teen America pageants, ma'am?

A. One was. And this other one was—I don't know what the exact name of it was. It had some kind of a name.

Q. Okay. Now, directing your attention to some time around July of 1984, do you recall that month, ma'am?

A. Yes, I do.

Q. Do you remember if some time in that month you found some pictures?



A. Yes, I do.

Q. And are those the nude pictures you found that you have seen?

A. No, no.

Q. Where were these pictures, ma'am?

A. They were in a safe that was in my bedroom close that kept a lot of personal papers and stocks for the children.

Q. After you found those pictures, did you have any conversation with [L] about them, yes or no?

A. Yes.

Q. And did you show her the pictures, yes or no?

A. No.

(p. 46) Q. Did you tell her you had any pictures?

A. I told her I had found something that was very upsetting—

Q. No. Did you tell her you had any pictures?

A. I told her I had found pictures.

Q. All right. And you had some conversation with her about the pictures?

A. Yes, I did.

Q. But you never showed the pictures?

A. No. I put them back.

Q. Okay. Then you put them back in the safe; is that correct?

A. Yes.

Q. And did you have any conversation in July of '84 when you found the pictures with Mr. Oakes?

A. No.

Q. Okay. And you were married to Mr. Oakes in July of 1984; isn't that correct?

A. Yes, I was.

Q. And some time, ma'am, in September of 1984, you filed for divorce; isn't that correct?

A. Yes, I did.

Q. And after September of 1984, you went to the police with the pictures, and you filed a complaint?

A. (No response).

Q. Do you recall—

A. Yes, I went to the police. But we didn't have all of the (p. 47) pictures that we have now.

Q. Ma'am, the pictures—

A. Yes.

Q. —that you brought to the police were in November?

A. Yes.

Q. And some time, ma'am, in September of '84, after you filed for the divorce, weren't you ordered out of the house by the judge?

Mr. Ball: Objection.

The Court: That objection is sustained.



Q. In October or November when those pictures were brought to the police, you weren't living in the house; isn't that correct?

A. No, I was living with my mother.

Q. Ma'am, yes or no—

A. Yes.

Q. —you weren't living in the house?

A. No, I was not living in the house.

Q. And [L] wasn't living in the house?

A. No, she wasn't.

Q. And it is your testimony, ma'am, you never took any of those flash dance pictures?

A. No, I didn't.

Ms Kathiwala: Nothing further.

The Court: Mr. Ball.

(p. 48) CROSS-EXAMINATION

BY. MR. BALL:

Q. Ma'am, it was Douglas Oakes's idea that your daughter begin to model and go to these dance classes; isn't that right?

A. Yes, it was.

Q. And that was because Douglas Oakes told you, as he told your daughter, that she was a very good looking young woman, and that she could be in pageants at some point; is that right?

A. Yes.

Q. The pictures that you found in July of 1984, were not the ten or the portions of the ten photographs that—

A. No, they weren't.

Q. You do know those photographs that I am referring to were introduced into evidence, right?

A. Yes, I do.

Q. The photographs that you saw in the safe were not nude photographs, were they?

A. They weren't totally nude. They were like when you first have a camera and you don't know how to run it, the color was like yellow, gold, there was no real color to it. In other words the film, something was wrong with it. And this was just about the time that Douglas had just bought a 35 millimeter camera, and they were like poor quality. (p. 49) But the ones that were found after were perfect.

Q. When you found those photographs, you did speak to [L] about it?

A. Yes.

Q. And she told you that no, nothing is going on, you know we have stopped doing that, or something to that effect; is that right?

A. Yes.

Q. And it was some time after that, some time in September, or—strike that. How often was it, or what period of time expired when you went to the police with these nude photographs, and you found some other ones at the house, or found those ones at the house?



A. I had found the first group in July. I had filed for divorce in September. I had moved out of the house willingly in the 1st of October with the children. [L] was staying at her friend's because she couldn't live in Worcester with me at my mother's and attend Leicester School. [L] broke down, I guess, at her friend's house—

Ms. Kathiwala: I object. May the answer to the question—

A. It was November.

The Court: Wait just a moment. That objection is sustained.

Q. Just when did you find those pictures that were introduced, (p. 50) ma'am, or when were they found?

A. In November.

Q. And how soon after finding those did you go to the police with them?

A. That night.

Mr. Ball: I have no further questions.

Ms Kathiwala: Nothing further of this witness, your Honor.

The Court: All right. Thank you.

Ms Kathiwala: Douglas Oakes, please.

(DOUGLAS LOUIS OAKES, THE DEFENDANT, WAS SWORN AND TESTIFIED UPON HIS OATH AS FOLLOWS:)

DIRECT EXAMINATION

BY MS KATHIWALA:

Q. What is you name, sir?

A. Douglas Louis Oakes.

Q. Where do you live, sir?

A. 3 Fisher Road, Holden.

Q. Sir, are you the stepfather of [L] [S]?

A. Yes, I am.

Q. The former husband of Cynthia Oakes who just testified?

A. Yes.

Q. And tell us, sir, 1983 were you married to Mrs. Oakes?

A. Yes, I was.

Q. And how long have you been married to her?

(p. 51) A. Since 1976.

Q. And how long have you been with Mrs. Oakes?

A. Since '71.

Q. And had her children been living with you all of that time, sir?

A. Yes, they were.

Q. And you have known these people how many years altogether now, sir?

A. 25. Well, I knew—I knew my wife before the children were born, because she was previously married.

Q. Some time they came to live with you. How old was [L] [S]?



A. I think she was only six months old. Or maybe three months. She was just born maybe. No, she was under a year old.

Q. And you knew her, sir,—did she live with you continuously from when she was three or six months old up to September or October of 1984?

A. Yeah. I brought them up.

Q. And drawing your attention, sir, to some time around September of 1983, do you recall that time?

A. Yes.

Q. Did you have occasion to have any discussion with Cynthia Oakes and [L] [S] concerning her going to modeling school, just yes or no?

(p. 52) A. Yes.

Q. And did you have some discussions with Cynthia Oakes about it, your wife?

A. Yes.

Q. And was [L] [S] present?

A. Yes.

Q. And any one else present?

A. Maybe the smaller, you know, the smaller kids were there. I don't know if [M] was there.

Q. Was this in your house or somewhere else?

A. It was at the kitchen table.

Q. Where was this at? What address?

A. 31 Ingram Road, Cherry Valley.

Q. And after that discussion, sir, was Miss [S] enrolled in the LaFemmina School?

A. Yes.

Q. And after that discussion, sir, was Miss [S] enrolled at the Joanne Giguere School of Dance?

A. She didn't go to the Joan Dance School until after all the modeling and after all the pageants that she was already in. That was the last thing she was to do before she entered any more pageants.

Q. And did Miss [S] also attend another modeling school?

A. Yes.

Q. What school was that, sir, if you know?

(p. 53) A. Leicester High School.

Q. And sir, how many pictures—strike that. When did you start taking pictures of Miss [S]?

A. It was either the—the end of '82 and '83 when they cut out a piece of advertisement in the paper that was for Miss Teen America, and that was going to be held at the Sheraton, I believe, in Framingham.

Q. Did you cut that out or did someone else?

A. [L] cut it out.

Q. And did you enroll [L] in the Miss Teen Pageant, Miss Teen America Pageant?

A. The mother, my wife, ex-wife enrolled her.

Q. And did you enroll Miss [S] in LaFemmina Modeling School?



A. No.

Q. And did you tell Miss [S] you were going to take photographs of her?

A. Yes.

Q. Did you ask her or did you tell her?

A. No, I asked her. I asked her if she wanted to do it, is this what she wanted to do.

Q. And what did she say to you?

A. "That is what I want to be. I want to be a model."

Q. A what?

A. A model.

(p. 54) Q. And how many photographs, sir, of Miss [S] of that year and half would you estimate you took?

A. Maybe a thousand.

Q. And did you create any photo-album?

A. There was—I created two myself, and they created one themselves, you know.

Q. And any of those photo-albums called portfolios?

A. Yes. One was—the one they made was a portfolio.

Q. And did Cynthia Oakes ever take photographs of [L] [S]?

A. Yes, she did.

Q. And was Cynthia Oakes present on any occasion when you were taking photographs of [L] [S]?

A. Yes, she was.

Q. And when were these photographs taken, by the way, sir, at all different times of the day or was there a certain time of day?

A. No. They were all numerous different—you know, some could have been in the morning, some in the afternoon. I don't think any of them were ever taken at night. It was basically during the day or on weekends, you know. I don't know exactly the time, you know.

Q. And you have two little children also, sir, do you not?

A. Yes, I do.

Q. And what are their names?

(p. 55) A. Lisa and David.

Q. Were they home when these photographs were taken, sir?

A. Yes, they were.

Q. And photographs were taken in the home, sir?

A. Yes, they were.

Q. Were there any photographs ever taken anywhere away from the home?

A. At the pageant. And I think at different—in parks we took pictures.

Q. Did Mrs. Oakes every go with you?

A. Yes, she did.

Q. And did you ever have conversations with [L] [S] and Mrs. Oakes about her modeling?



A. Yes, I did.

Q. And did [L] [S] ever ask you to take pictures of her?

A. Yes, she did.

Q. Did [L] [S] ask you ever to create these portfolio albums?

A. Yes, she did.

Q. And isn't it true, sir, that Karen LaFemmina of the LaFemmina Modeling Studio, wanted these portfolio albums?

A. Yes.

Q. And isn't it also a requirement, sir, to enter these beauty pageants, that you have to submit photo portfolios?

(p. 56) A. Yes, it is.

Q. Who would make up those portfolios, sir?

A. Well, unless you had—that is why they decided to get a professional, too, to make up some pictures also.

Q. And was that Mr. Sims?

A. Yes, it was.

Q. And who called Mr. Sims?

A. My wife, ex-wife.

Q. Cynthia Oakes?

A. Yes.

Q. And did [L] go to see Mr. Sims?

A. Yeah. One night they went. No, they went more than one night. They went about five different times.

Q. How many times did you go?

A. I only picked her up. I didn't go. Because he didn't want me there. He said he wanted [L] by herself.

Q. Now, sir, you saw those ten photographs?

A. No, I didn't.

Ms Kathiwala: May I approach the witness, your Honor?

The Court: Sure.

Q. Sir, take a look at these.

A. (Complying).

Q. You recognize those, sir?

A. Yeah. I have seen some of them.

(p. 57) Q. Did you take these photographs, sir?

A. Not those.

Q. You didn't take these photographs?

A. Nope.

Q. Do you know who did take those photographs?

A. Well, if it wasn't me, it had to be my wife.

Mr. Ball: Objection.

The Court: Well, that answer is excluded. He can testify who took the photographs, not who he might speculate.



A. Oh, okay.

Q. And when is the first time you seen those photographs, sir?

A. Just now.

Q. Sir, some time in September of 1984, do you recall that month?

A. September of what, excuse me?

Q. September of 1984.

A. Right.

Q. Do you recall that month? Do you recall what happened in that month?

A. (Nodding).

Q. What happened?

A. Got a divorce.

Q. And do you recall November of 1984, sir?

A. Yes, I do.

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SUPREME COURT, U.S.
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CLERK

No. 87-1651

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1988

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COMMONWEALTH OF MASSACHUSETTS,
*Petitioner,*

v.

DOUGLAS L. OAKES,
*Respondent.*

---

**On Writ of Certiorari to the Supreme Judicial Court of the Commonwealth of Massachusetts**

---

## BRIEF FOR PETITIONER

---

JAMES M. SHANNON *
Attorney General
Commonwealth of Massachusetts

PHYLLIS N. SEGAL
A. JOHN PAPPALARDO
Deputy Attorneys General

MADELYN F. WESSEL
JUDY G. ZEPRUN
H. REED WITHERBY
Assistant Attorneys General
One Ashburton Place, Rm. 2001
Boston, Massachusetts 02108
Tel.: 617-727-2200

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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## QUESTION PRESENTED

Whether the theoretical possibility that a criminal statute designed to prevent the sexual abuse and exploitation of children could be applied marginally to conduct protected by the First Amendment justifies invalidation of the entire statute on overbreadth grounds and reversal of respondent's conviction without deciding whether the respondent's actions were within the statute's substantial legitimate reach.

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1988

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No. 87-1651

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COMMONWEALTH OF MASSACHUSETTS,
*Petitioner*,

v.

DOUGLAS L. OAKES,
*Respondent*.

---

**On Writ of Certiorari to the Supreme Judicial Court of the Commonwealth of Massachusetts**

---

## BRIEF FOR PETITIONER

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### OPINIONS BELOW

The opinion of the Supreme Judicial Court for the Commonwealth of Massachusetts is reported at 401 Mass. 602, 518 N.E.2d 836 (1988), and is reproduced in the Appendix A to the Petition for Writ of Certiorari. The opinion of the Superior Court Department of the Trial Court of Massachusetts is unpublished but is reproduced in the Supplemental Appendix to the Petition for Writ of Certiorari at 1.

## JURISDICTION

The judgment of the Supreme Judicial Court for the Commonwealth of Massachusetts was entered on February 1, 1988. The petition for a writ of certiorari was filed on April 1, 1988. This Court granted the petition on May 23, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3) (1982).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment of the United States Constitution provides, in pertinent part:

> Congress shall make no law . . . abridging the freedom of speech, or of the press. . . .

The Fourteenth Amendment of the United States Constitution provides, in pertinent part:

> [N]or shall any state deprive any person of life, liberty, or property, without due process of law. . . .

The relevant sections of Chapter 272 of the General Laws of Massachusetts provide:

> Whoever with knowledge that a person is a child under eighteen years of age, or whoever while in possession of such facts that he should have reason to know that such person is a child under eighteen years of age, hires, coerces, solicits or entices, employs, procures, uses, causes, encourages, or knowingly permits such child to pose or be exhibited in a state of nudity or to participate or engage in any act that depicts, describes or represents sexual conduct for purposes of visual representation or reproduction in any book, magazine, pamphlet, motion picture film, photograph, or picture shall be punished by imprisonment in the state prison for a term of not less than ten nor more than twenty years, or by a fine of not less than ten thousand dollars nor more than fifty thousand dollars, or by both such fine and imprisonment.
>
> It shall be a defense in any prosecution pursuant to this section that such visual presentation or reproduction of any posture or exhibition of any posture or exhibition in a state of nudity was produced, processed, published, printed or manufactured for a bona fide scientific or medical purpose, or for an educational or cultural purpose for a bona fide school, museum or library.

Mass. Gen. Laws Ann. ch. 272, § 29A (West Supp. 1987).[1]

> As used in sections twenty-eight, twenty-eight C, twenty-eight D, twenty-eight E, twenty-nine, twenty-nine A, twenty-nine B, thirty and thirty D, the following words shall, unless the context requires otherwise, have the following meanings: . . .
>
> "Nudity", uncovered or less than opaquely covered post-pubertal human genitals, pubic areas, the post-pubertal human female breast below a point immediately above the top of the areola, or the covered male genitals in a discernibly turgid state. For purposes of this definition a female breast is considered uncovered if the nipple or the nipple or areola only are covered. In the case of pre-pubertal persons nudity shall mean uncovered or less than opaquely covered pre-pubertal human genitals or pubic area. . . .

Mass. Gen. Laws Ann. ch. 272, § 31 (West Supp. 1987).

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[1] Section 29A was amended by St. 1987, c.294, § 1 to include "any live performance," an amendment which does not apply to this case. *See also Commonwealth v. Oakes*, 401 Mass. 602, 603 n.1, 518 N.E.2d 836, 837 n.1 (1988).

## STATEMENT OF THE CASE

### A. Procedural History

On January 9, 1985, the respondent Douglas Oakes ("Oakes") was indicted by a Worcester County Grand Jury for "soliciting a child to pose for pornographic purposes" in violation of Mass Gen. Laws ch. 272, § 29A (West Supp. 1987) [hereinafter, "section 29A"], Joint Appendix 1, 3a-4a [hereinafter, "J.A. (page)"].

On March 21, 1985, Oakes moved to dismiss the indictment on the ground, *inter alia*, that the statute was invalid on First Amendment overbreadth grounds. J.A. 1a. On July 16, 1985, the Superior Court denied the motion to dismiss. J.A. 1a.

On October 10, 1985, after a short trial, a Superior Court jury found Oakes guilty. J.A. 1a. The Superior Court sentenced him to a ten-year term to be served at MCI-Concord. J.A. 1a.

On November 7, 1985, Oakes appealed. J.A. 1a. On February 1, 1988, the Supreme Judicial Court of Massachusetts reversed Oakes's conviction and struck down the statute, section 29A, as unconstitutional. J.A. 2a.

### B. Facts at Trial

This case arises from Oakes's coercion of his stepdaughter, a fourteen-year-old girl,[2] to pose for photographs that depicted her bare-breasted and in positions that are sexually suggestive.

---

[2] When the victim first posed for the photographs in September, 1983, she was fourteen. *See* Tr. 22-24; J.A. 18a-20a. The Massachusetts Supreme Judicial Court misstated her age as fifteen. *Oakes*, 401 Mass. at 604, 518 N.E.2d at 837. References to the trial transcript are denoted "Tr. (page)." To the extent a portion of the trial transcript is reproduced in the Joint Appendix, a parallel citation is indicated.



Beginning in September, 1983, the victim was a modeling student at La Femmina Modeling School. Tr. 23; J.A. 19a. Oakes, her stepfather, began to take hundreds or thousands of photographs of the victim. Tr. 24, 54; J.A. 2a, 5a. At first, Oakes took photographs of the victim in clothes but then he progressed to taking photographs of her in body suits, bathing suits, and outfits from Frederick's of Hollywood. Tr. 24, 65-68; J.A. 21a, 34a-35a. Ultimately, he manipulated her into posing for nude photographs. Tr. 24, 68; J.A. 21a. Oakes selected the poses. Tr. 26; J.A. 23a.

The photographs depict the victim posed on top of a bar in the basement of the house, wearing a red scarf around her neck and red and white striped bikini underpants. The photographs prominently feature her breasts. *See* Trial Exs. 1-10.[3] The nature of the photographs can be gleaned from Oakes's suggestion to his stepdaughter that he wanted to make her "big for Playboy." Tr. 28; J.A. 25a.

The photographs were taken in secret. Although the victim's mother knew that Oakes was photographing the victim in clothes, she did not know that he was also taking nude photographs. Tr. 37; J.A. 34a.[4]

Not surprisingly, these sexually suggestive and inappropriate photographs troubled and embarrassed the victim. She ripped them up and threw them away in the woods. Tr. 27; J.A. 24a.

The coercive nature of the relationship between Oakes and his stepdaughter[5] is demonstrated by what happened

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[3] The trial exhibits were transmitted as part of the record from the Superior Court Department of the Trial Court, Worcester County, MA, to the Clerk of the Supreme Court.

[4] The photographs were not only taken in secretive circumstances but also were kept hidden. They were hidden first in a locked safe (Tr. 45; J.A. 43a) and then in a false ceiling in the basement. Tr. 36; J.A. 34a.

[5] Children who are the subjects of photographs that depict them engaged in sexual activity or in a state of nudity commonly are

next: upon discovering that the photographs were missing, Oakes picked up the victim at her friend's house, and forced her to go into the woods to recover the photographs and then to lay them on the kitchen table to dry. Tr. 27; J.A. 24a.

At trial, Oakes denied taking the photographs. Tr. 57-61.

## SUMMARY OF ARGUMENT

### I

The First Amendment overbreadth doctrine is "strong medicine" to be used "only as a last resort." Invalidation of an otherwise valid criminal statute is not justified where the reviewing court has determined that a central core of regulable conduct is being addressed. To be unconstitutional, the statute's overbreadth must be substantial in comparison to its legitimate applications. In addition, as this Court has recently emphasized, the possibility that the statute may be applied to protected conduct must be more than conceivable, it must be real. Case-by-case adjudication is the appropriate cure where possible instances of invalid application are comparatively insignificant and merely theoretical. (Pages 9-13).

The court below erroneously asked only whether the challenged statute, which proscribes the sexual exploitation of children through their use in visual reproductions depicting them engaged in sexual activity or in a state of nudity, was susceptible to any troubling application—such as the depiction of a naked one-year-old in a wading pool. Once the court determined that such an application of the statute was conceivable, it

being exploited by the individual taking the photographs. *See infra* section II B. In the present case, Oakes was acquitted of four charges of rape of his stepdaughter. Comm. Brief, A.C. No. 86-147 at 2 n.2.



ceased all other consideration of the statute. The court's failure to consider whether the potential overbreadth is substantial or real constitutes a fundamental misapplication of federal overbreadth doctrine. (Pages 13-15).

### II

The challenged statute, Mass. Gen. Laws ch. 272, § 29A ("section 29A"), defines a core of criminal conduct that the state may legitimately prohibit. The state has a compelling interest in preventing the sexual exploitation of children. In the area of child pornography, this Court has struck the balance of competing interests in favor of the compelling interest in protecting children. Far fewer First Amendment concerns are raised by laws like section 29A that regulate the production of child pornography, than by laws that regulate distribution. (Pages 15-17).

Section 29A is a child sexual exploitation statute punishing the enticement, solicitation, hiring and manipulation of children to pose nude or to engage in sexual activity for purposes of visual representation. The conduct proscribed is sexual exploitation, even if the product is not legally obscene. The child who has been manipulated or coerced into posing for nude photographs suffers harm no matter where the camera is aimed or what the lens frames. The child who has been forced to pose in a state of nudity has been conditioned to respond as a sexual object; may have been seduced; may have been physically molested; and may be harmed by the knowledge that the photographs exist. Finally, the photograph is an instrument of sexual exploitation as well as a record that sexual exploitation has occurred. (Pages 18-24).

Section 29A is part of an overall statutory scheme enacted to protect children from abuse. The text of the statute reflects the reality of child abuse: the conduct proscribed is exploitive conduct. Typically and historically, indictments under section 29A arise in conjunction with indictments for rape, indecent assault and battery

of a minor under fourteen, or both. There are no reported prosecutions for the type of benign parental photographs which common sense and the statute's plain meaning and context readily reveal to be beyond its intended reach. As such, both on its face and as a matter of practice, the scope of the statute's sweep in combatting the sexual exploitation of minors is plainly legitimate. (Pages 24-27).

III

The court below was overwhelmingly concerned with conceivable marginal applications of section 29A to prohibit benign parental pictures of young naked children or the use of child models to produce great works of art. This concern is unfounded. The purpose of the overbreadth doctrine—to avoid a chilling effect upon the exercise of First Amendment rights—is not served when the threat is neither real nor substantial. The goals, text, context, and enforcement history of section 29A make clear that the applications hypothesized by the court below are unrealistic and that prosecutors have had no difficulty in interpreting section 29A well within constitutional boundaries. In addition, the defense expressly provided in section 29A for bona fide works minimizes any risk that the statute will be unjustly applied. Further, appellate review would be available on a case-by-case basis if the statute were applied to arguably protected conduct. In sum, the threat to protected activity is neither real nor substantial and does not justify striking section 29A as invalid on its face. (Pages 27-31).

IV

Respondent Oakes's conduct in taking photographs of his fourteen-year-old stepdaughter with her breasts bare and prominently displayed was sexually exploitive and constitutionally proscribable. The photographs depict the victim wearing only a red scarf and striped bikini underpants. They do not depict the victim in the way a



child normally sits, reclines, or is positioned for a photograph. In some, she assumes a coy or sexually suggestive attitude. The photographs were produced in secret and were kept hidden. They caused the victim embarrassment, and when she threw them away, Oakes coerced her to retrieve them from the woods. Oakes did not testify to any benign or innocent explanation of his conduct, and the jury rejected any notion that the photographs had a bona fide purpose. The facts make clear that the statute, as applied to Oakes, is constitutional. (Pages 31-33).

ARGUMENT

I. THE COURT BELOW FAILED TO PROPERLY APPLY THE FIRST AMENDMENT OVERBREADTH DOCTRINE.

A. First Amendment Overbreadth Is A Drastic Remedy To Be Applied Only When Infringements On Protected Expression Are Substantial And Real.

The First Amendment overbreadth doctrine is an exception to the general rule that a person to whom a statute may be applied constitutionally may not challenge it on the grounds that it might conceivably be unconstitutionally applied to others in cases not before the court. *New York v. Ferber*, 458 U.S. 747, 767 (1982); *Broadrick v. Oklahoma*, 413 U.S. 601, 610 (1973); *see generally Gooding v. Wilson*, 405 U.S. 518 (1972); *Thornhill v. Alabama*, 310 U.S. 88 (1940).[6]

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[6] Beyond this "standing" component, the overbreadth doctrine also expresses a substantive constitutional standard for determining the validity of a statute affecting expression. *See* Monaghan, *Overbreadth*, 1981 S. Ct. Rev. 1, 3. This aspect of the overbreadth doctrine recognizes that even "under 'conventional' standing principles, a litigant has always had the right to be judged in accordance with a constitutionally valid rule of law." *Id.* at 3. In recent cases, this Court has described such a facial challenge as applying "to a statute that in *all* its applications directly restricts protected first amendment activity and does not employ means narrowly tailored to

Because the impact of the overbreadth doctrine can be devastating, leading, as in the present case, to total invalidation of a statutory scheme of profound importance to a state, this Court has made clear that this type of facial attack is "strong medicine" to be used "only as a last resort." *Broadrick*, 413 U.S. at 613. The narrow nature of the overbreadth doctrine was recently emphasized in *New York State Club Association v. City of New York*, 56 U.S.L.W. 4653, 4656 (U.S. June 29, 1988). *See infra* p. 12.

Particularly where conduct as well as speech is involved, this Court has made clear that the overbreadth of a statute must be substantial "*judged in relation to the statute's plainly legitimate sweep.*" *Ferber*, 458 U.S. at 770 (emphasis added) (quoting *Broadrick*). Facial invalidation is an inappropriate "cure" for potential marginal infringements of First Amendment rights, where " 'the remainder of the statute . . . covers a whole range of easily identifiable and constitutionally proscribable . . . conduct . . . .' " *Id.* at 770 n.25 (quoting from *CSC v. Letter Carriers*, 413 U.S 548, 580-81 (1973)); *compare Boos v. Barry*, 56 U.S.L.W. 4254, 4249 (U.S. March 22, 1988) (provision making it unlawful to congregate within 500 feet of embassy is not overbroad because it does not reach a substantial amount of constitutionally protected conduct, only conduct that threatens the peace and security of the embassy) *with Houston v. Hill*, 107 S. Ct. 2502, 2513 (1987) (enforceable portion of challenged statute has no "core of constitutionally

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serve a compelling governmental interest." *Secretary of State of Maryland v. J. H. Munson Co.*, 467 U.S. 947, 965-66 n.13 (1984) (emphasis added); *see New York State Club Association v. City of New York*, 56 U.S.L.W. 4653, 4657 (U.S. June 21, 1988); *City Council v. Taxpayers For Vincent*, 466 U.S. 789, 798 n.15 (1984). Overbreadth in this sense was neither claimed by respondent Oakes nor relied upon by the court below, and it obviously has no application to this case because the Massachusetts child sexual exploitation statute in issue here does not fit this description. *See infra* pp. 24-27.



unprotected expression") *and State of Maryland v. Munson*, 467 U.S. at 965-66 (no "core of easily identifiable and constitutionally proscribable conduct that the statute prohibits").

Where the challenged statute is aimed at criminal conduct, concern over its potential chilling effect diminishes even further. As this Court explained in *Broadrick*, the limited role of the overbreadth doctrine:

> attenuates as the otherwise unprotected behavior that it forbids the State to sanction moves from "pure speech" toward conduct and that conduct—even if expressive—falls within the scope of otherwise valid criminal laws that reflect legitimate state interests in maintaining comprehensive controls over harmful, constitutionally unprotected conduct. Although such laws, if too broadly worded, may deter protected speech to some unknown extent, there comes a point where that effect—at best a prediction—cannot, with confidence, justify invalidating a statute on its face and so prohibiting a State from enforcing the statute against conduct that is admittedly within its power to proscribe.

413 U.S. at 615.

The question therefore is not, as the court below conceived it, whether the statute is susceptible to a troubling application or set of applications, but rather whether "these arguably impermissible applications of the statute amount to more than a tiny fraction of the materials within the statute's reach." *Ferber*, 458 U.S. at 773. Conversely, it is clear that this aspect of the substantiality requirement entails proof that the statute is "unconstitutional in a substantial portion of the cases to which it applies." *Regan v. Time, Inc.*, 468 U.S. 641, 650 (1984).[7]

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[7] *See People v. Holder*, 96 Ill. 2d 444, 454, 451 N.E.2d 831, 835 (1983) ("[A]ny such conceivable impermissible applications are

This Court has recently emphasized that such potential applications not only must be *substantial* compared to the law's legitimate applications, they must also be *real*: "[T]he mere fact that one can *conceive* of some impermissible applications of a statute is not sufficient to render it susceptible to an overbreadth challenge." *Taxpayers For Vincent*, 466 U.S. at 800 (emphasis added).[8] Thus, in *Taxpayers For Vincent*, this Court rejected an overbreadth challenge based on the "assumed effect of the ordinance on third parties," rather than on anything in the record to indicate an effect on interests in free speech. 466 U.S. at 801.

Similarly, in upholding New York City's Human Rights Law just last spring, this Court was unwilling to entertain a facial overbreadth challenge simply because, as a theoretical matter, there might be some parties to whom application of the law would be an unconstitutional infringement of First Amendment rights. Reiterating that the overbreadth doctrine is "strong medicine," this Court opined that: "To succeed [in] its challenge, appellant must demonstrate *from the text of*

dwarfed by the statute's legitimate reach in prohibiting threatened criminal activity").

[8] As other lower courts have construed the post-*Ferber* substantial overbreadth requirement, it is immaterial if a statute may conceivably reach some instances of protected speech. "Defendant may be correct in saying that the literal language of the statute could be interpreted to embrace some protected speech, but this does not suffice to overturn a statute. There is no substantial overbreadth." *United States v. Rogers*, 755 F.2d 533, 543 (7th Cir.), *cert. denied*, 473 U.S. 907 (1985). *See also United States v. Reedy*, 632 F.Supp. 1415, 1421 (W.D. Okla. 1986) (court rejecting argument that 18 U.S.C. § 2551(a) (Supp. 1984) is substantially overbroad because the expression prohibited by the statute is not protected), *aff'd*, 845 F.2d 239 (10th Cir. 1988); *State v. Lance*, 721 P.2d 1258, 1265 (Mont. 1986) ("Although it might be possible that some rare situations will arise in the future, . . . those possible unconstitutional applications of the statute are not sufficient to invalidate it on its face").



*the law and from actual fact* that a substantial number of instances exist in which the law cannot be applied constitutionally." *New York State Club Association*, 56 U.S.L.W. at 4657 (emphasis added). *See also Boos*, 56 U.S.L.W. at 4254.[9]

The lack of any record in the *New York State Club Association* case demonstrating the existence and specific characteristics of any potential party to whom the law could not constitutionally be applied, coupled with the Court's confidence that New York City's enforcement agency could and would enforce the law in good faith and constitutionally, convinced this Court that a case-by-case analysis of specific facts was appropriate. *New York State Club Association*, 56 U.S.L.W. at 4657. Such an approach is the proper cure where possible instances of invalid application of a statute are comparatively insignificant or merely conceivable. As this Court made clear in *Ferber*, any potential overbreadth should be "cured through case-by-case analysis of the fact situations to which [the statute's] sanctions, assertedly, may not be applied." 458 U.S. at 774.

### B. The Court Below Invalidated an Entire Criminal Statute and Reversed Respondent's Conviction Because Conceivable Marginal Applications Might Infringe on Speech Interests, Without Even Considering The Statute's Legitimate Sweep.

In the decision under review, the Supreme Judicial Court of Massachusetts invalidated the Commonwealth's child sexual exploitation statute on First Amendment

[9] This Court's recent cases also clarify that the context and goals of a statute illuminate its reach, and are relevant in determining whether the statute withstands a challenge based on overbreadth or vagueness grounds. *See Boos*, 56 U.S.L.W. at 4259-60; *see also infra* pp. 28-31. For a discussion of the relationship between the overbreadth and vagueness doctrines, *see generally* L. Tribe, American Constitutional Law, § 12-31 at 1033 (1988).

overbreadth grounds because an application of the statute to conduct the court viewed as clearly lawful, such as parental pictures of very young naked children running on the beach, was conceivable. *Commonwealth v. Oakes*, 401 Mass. 602, 605, 518 N.E.2d 836, 838 (1988). Contrary to the clear requirements of the overbreadth doctrine, *see supra* § IA, the court below failed to consider whether such marginal applications are either substantial or real. *See Oakes*, 401 Mass. at 605, 518 N.E.2d at 838.

While the application of section 29A to lawful conduct hypothesized by the court below may be a theoretical possibility, it is one that runs counter to the clear purposes, mandate and context of the statute, issues which the majority below wholly failed to consider. *See infra* § III. The statute is targeted at child sexual exploitation and abuse, evils the Commonwealth has an indisputable and compelling interest in combatting. *See infra* pp. 15-16. That these purposes and the legitimate reach of the statute are well understood is demonstrated by the statute's enforcement history. *See infra* pp. 26-27. The remoteness of the chilling effect feared by the court is clear from the majority's own acknowledgement that "virtually every person would regard" such protected activities as lawful. *Oakes*, 401 Mass. at 605, 518 N.E.2d at 838.

Inexplicably, the majority decision does not examine whether the statute addresses a central core of constitutionally regulable criminal conduct. *See Oakes*, 401 Mass. at 603-604, 518 N.E.2d at 837-838. This failure to consider whether the overbreadth is substantial rests on a mistaken view of federal law. *See Ferber*, 458 U.S. at 771 n.26; *supra* pp. 9-11.

Nor did the majority make any apparent effort to determine whether section 29A is capable of a narrowing construction or severance of the provisions thought to be constitutionally suspect. *See Oakes*, 401 Mass. at 611 n.4, 518 N.E.2d at 841 n.4 (O'Connor, J., dissenting)



("[T]he statute is clearly severable . . . the court's opinion fails to address this issue"). *See generally Ferber*, 458 U.S. at 769 n.24.

The short opinion in the case suggests strongly that once the majority determined that section 29A conceivably criminalized conduct that virtually every person would regard as lawful, such as photographing a naked one-year-old romping in a wading pool, it ceased all other consideration of the statute. As this Court made clear in *Ferber*, however, state courts "should not be compelled to entertain an overbreadth attack when not required to do so by the Constitution." 458 U.S. at 767. This Court "is the final arbiter of whether the Federal Constitution necessitated the invalidation of a state law," *id.*, and can correct the state court's error, just as it did in *Ferber* itself.

## II. SECTION 29A DEFINES A CORE OF CRIMINAL CONDUCT THAT THE COMMONWEALTH MAY LEGITIMATELY PROHIBIT.

### A. The State Has A Compelling Interest in Preventing Sexual Exploitation Of Children.

This Court has made abundantly clear that a "State's interest in 'safeguarding the physical and psychological well-being of a minor' is 'compelling.'" *Ferber*, 458 U.S. at 756-57 (*citing Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 607 (1982)). *Ferber* and a multitude of other cases establish that the state has the police power to regulate conduct that affects the health and well-being of minors. *Id.* at 758.[10]

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[10] *See also Bethel School District v. Fraser*, 106 S. Ct. 3159, 3166-67 (1986) (upholding imposition of sanctions by school district upon student as a result of lewd and indecent speech); *F.C.C. v. Pacifica Foundation*, 438 U.S. 726, 742-48, *reh. denied*, 439 U.S. 883 (1978) (upholding administrative regulation of broadcast of patently offensive words dealing with sex where children may hear broadcast); *Paris Adult Theatre I v. Slayton*, 413 U.S. 49, 67 (1973) (state has a legitimate interest in regulating exhibition of

In addition, this Court has specifically recognized that "the use of children as subjects of pornographic materials is harmful to the physiological, emotional and mental health of the child," *Ferber*, 458 U.S. at 758, and has given greater leeway to the states to regulate the distribution of child pornography than it has granted them to regulate adult materials that may not be totally obscene under *Miller v. California*, 413 U.S. 15 (1973). *Ferber*, 458 U.S. at 755-56. In the area of child pornography, this Court has struck the balance of competing interests in favor of the compelling interest in protecting children.

The constitutionality under the First Amendment of laws prohibiting the employment of children in the production of films and photographs that depict sexual activity has never been questioned. *Ferber*, 458 U.S. at 762. As this Court explained in *Ferber*: " 'It rarely has been suggested that the constitutional freedom for speech and press extends its immunity to speech or writing used as an integral part of conduct in violation of a valid criminal statute.' " 458 U.S. at 761-62 (quoting *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 498 (1949)).

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obscene materials in public places, including "adult theatres" from which minors may be excluded); *Ginsburg v. New York*, 390 U.S. 629, 640 (1968) (upholding statute protecting children from obscene periodicals); *Prince v. Massachusetts*, 321 U.S. 158, 170 (1963) (upholding statute prohibiting use of a child to distribute religious literature).

Traditionally, the Supreme Judicial Court of Massachusetts has manifested the same concern shown by this Court for the protection of minors from exploitation. *See, e.g., Custody of a Minor*, 375 Mass. 733, 754, 379 N.E.2d 1053, 1066 (1978) ("the State has a long-standing interest in protecting the welfare of children living within its borders"); *Commonwealth v. King*, 374 Mass. 5, 12 n.3, 372 N.E.2d 196, 201 n.3 (1977) (court notes that one of the reasons for prohibiting prostitution was to protect young uneducated women from exploitation); *Commonwealth v. Gallant*, 373 Mass. 577, 582-583, 369 N.E.2d 707, 711-712 (1977) (court points out the long history of legislation protecting female children under age sixteen from consenting to sexual intercourse).



*Cf. Arcara v. Cloud Books, Inc.*, 106 S. Ct. 3172, 3177 (1986) (the incidental effect on an anti-prostitution statute on operation of a bookstore failed to raise significant First Amendment concerns).

Courts that have reviewed statutes, like section 29A, designed to prevent the sexual abuse and exploitation of children in the production of child pornography have considered those production statutes to be easily capable of withstanding attacks on First Amendment grounds, in contrast to distribution statutes, like the New York statute upheld in *Ferber*, which may present more difficult First Amendment questions. Thus, in *United States v. Reedy*, 632 F. Supp. 1415, 1418-1419 (W.D. Okla. 1986), *aff'd*, 845 F. 2d 239 (10th Cir. 1988), the court had no difficulty in upholding 18 U.S.C. § 2251(a) (Supp. 1984), which makes illegal the inducement of children into sexual conduct for the purpose of making visual representations of sexual conduct: "[R]egulations governing activities of distributors of child pornography may be viewed with greater constitutional scrutiny than those regulating activities of coercers and producers, because the latter are considered to regulate primarily conduct and only incidentally speech." *See also United States v. Smith*, 795 F. 2d 841, 845 (9th Cir. 1986) (also upholding 18 U.S.C. § 2251(a) (Supp. 1984)), *cert. denied*, 107 S. Ct. 1964 (1987).[11]

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[11] Many state courts have similarly concluded that sexual exploitation of minors is not protected expression or speech. *See, e.g., Griffin v. State*, 396 So. 2d 152 (Fla. 1981) (statute dealing with use of minors in pornography "does not proscribe constitutionally protected speech or activities, but prohibits specific conduct relating to minors"); *Payne v. Commonwealth*, 623 S.W. 2d 867, 871 (Ky. 1981), ("The Courts clearly distinguish such statutes protecting a minor from actual use in a sexual performance. Such con-

**B. The Production Of Photographs That Depict Children Engaged In Sexual Activity Or Posed In A State Of Nudity Is Sexual Exploitation.**

The production of child pornography is itself child sexual abuse. As this Court recognized in *Ferber*: "The use of children as . . . subjects of pornographic material is very harmful to both the children and the society as a whole." 458 U.S. at 758 n.9. Abusers often produce child pornography in conjunction with their own sexual activity. *See* Lanning and Burgess, *Child Pornography and Sex Rings*, Fed. Bur. Inv. Law Enforcement Bull. at 13 (1984). The tie between sexual abuse and child pornography is so well established that the Attorney General of the United States has recommended that local and federal prosecutors ask child victims of sexual abuse whether photographs or films were made during the course of the abuse. U.S. Dept. of Justice, Attorney General's Comm'n on Pornography, Final Report (1986) at 696 [hereinafter referred to as "Attorney General's Report"].

It is important to recognize that manipulating, enticing, soliciting or coercing the posing of a child in a state of nudity is harmful to and sexually exploitive of the child even if the product is not legally obscene.[12] A.W.

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duct does not give rise to the same special free speech protection given the film or other media"), *cert. denied*, 456 U.S. 909 (1986); *State v. Helgoth*, 691 S.W. 2d 281 (Mo. 1985) (the activity engaged in by the defendant and prohibited by the statute is distinctly conduct, as contrasted with speech), *pet. for writ of habeas corpus denied*, 640 F. Supp. 1251 (E.D. Mo. 1986); *People v. Folk*, 109 Misc. 2d 738, 440 N.Y.S. 2d 984, 986 (1981) (state's interest in protecting juveniles from psychological or physical harm outweighs First Amendment concerns); *State v. Jordan*, 665 P.2d 1281, 1284 (Utah 1983) (sexual exploitation of minors is not protected expression or speech), *app. dism.*, 464 U.S. 910 (1983); *Freeman v. Commonwealth*, 288 S.E.2d 461, 464-65 (Va. 1982) (production of photographs of nude five-year old not protected speech).

[12] Unlike adults, children cannot give informed consent to the production or distribution of sexually exploitive photographs.



Burgess, *Child Pornography And Sex Rings* at 14; *see Ferber*, 458 U.S. at 758 n.9. "Child molesters frequently engage in acts that are behavorially, if not legally sexual acts. Seemingly normal acts, such as photographing children, touching children, wrestling with children, or even looking at children can be sexual acts for some individuals." Lanning, *Child Molesters: A Behavioral Analysis*, Nat'l Center for Missing and Exploited Children 33 (1987).

"At the very least, production of pornography involves posing a child in a suggestive fashion and in circumstances likely to cause nervousness, shame and anxiety." Potuto, *Stanley + Ferber = Constitutional Crime of At-Home Child Pornography Possession*, 76 Ky. L. J. 15, 39-40 (1987). "There are legitimate questions about when 'mere' nudity stops being 'mere' nudity and has such clear connotations of sexual activity that it ought at least to be analyzed according to the same factors that [the Commission on Pornography] discuss[es] with respect to sexually explicit materials containing neither violence nor degradation." Attorney General's Report at 347.

Significantly, also, whether a photograph depicts "mere nudity" or actual sexual conduct may be irrelevant from the perspective of the child who has been manipulated or coerced into its production.[13] In terms of the harm suffered by the child who has been coerced, manipulated or enticed into disrobing and posing, a photograph that

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*People v. Spargo*, 103 Ill. App.3d 280, 59 Ill. D. 8, 431 N.E.2d 27, 31 (1982). *Cf. Bellotti v. Baird*, 443 U.S. 622, 634-37 (1979) (inability of children to make decisions in an "informed, mature manner").

[13] While this Court has indicated that an ordinance that broadly prohibited the showing of films containing simple nudity is unconstitutionally overbroad, *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 215 (1975), it has never held that compelling a child to pose nude is protected.

might meet a typical statutory definition of "sexual conduct" [14] because the photographer aimed the camera primarily at the child's genitals is not distinguishable from a photograph of a child's torso that merely includes the child's genitals in view.

Thus, regardless whether the photograph depicts actual sexual activity or the exhibition of a child nude, a child who has been forced to pose in a state of nudity has been victimized: she has been conditioned to respond as a sexual object; she may have been seduced; and she may have been physically molested.[15] In the short term, the effects of the victimization may be "depression, suicidal thoughts, feelings of shame, guilt, alienation from family and peers, and massive acute anxiety." Attorney General's Report at 613 n.454 (citing U. Schoettle, Report to the United States Attorney General's Commission on Pornography at 11 (Miami hearing)). In the long term, many victims are "likely [to] suffer a repetition of the abuse cycle (this time as the abuser), chronic low self esteem, depression, anxiety regarding sexuality, role confusion an fragmented sense of the self, and possible entry into delinquency or prostitution." *Id.* Experts "seem

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[14] *See, e.g.*, "lascivious exhibition of the genitals," 18 U.S.C. § 2255.

[15] What is depicted in the photograph may be only the least of the sexual activity that actually occurred. "Most of [the] harm results from sexual molestation from adults, whether it is recorded on film or not. Even if the child is photographed alone or with other children in simulated acts, the producers of the visual material often engage in sexual activity with the child before and after photographing. Thus, the absence of adults in the visual material does not mean that the child has not been sexually assaulted by an adult." Note, *Protection of Children From Use in Pornography: Toward Constitutional and Enforceable Legislation*, 12 U. Mich. J. L. Ref. 295, 300 and nn.35-36 (1979) (citing Sexual Exploitation of Children: Hearings Before the Subcommittee on Crime of the House Committee on the Judiciary, 95th Cong., 1st Sess. at 59, 114). Indeed, Oakes himself was indicted but acquitted of four counts of rape. *See supra* note 5.



unable to unravel the harm caused by the child pornography alone from the harm derived from the collective abuse—the enticement or desensitizing, the participation in the sexual activity, the selling and the trading of children on an underground pornography market, and the harm caused by the permanence of the record." *Potuto, Stanley + Ferber, supra* at 38-39.

In addition to the harm suffered by children who are coerced, used and manipulated into the production of nude or sexually explicit photographs, the pictures that result from this sexual exploitation are inherently harmful to children. Public exposure of the child's body and involvement in sexual activity may result in emotional damage beyond the physical damage incurred in the actual photographing. *Ferber*, 458 U.S. at 758 nn.9-10. The child subject of the photograph knows that there is a record of her sexual abuse; that the photograph is in circulation; and that its existence may affect her future. *See id.* at 758 n.10.[16] Nudity is embarrassing to many children and is not the norm. One recognized expert confirmed in a study the idea that:

> [M]odesty is still in fashion. Nudity in front of parents or siblings is not the norm among twelve year old Americans . . . In the most uncomfortable situation, between a father and a daughter, 95% of the girls said they would be embarrassed. Across the whole spectrum, family members are more often embarrassed to be naked than not.

D. Finkelhor, *The Sexual Climate of Families*, University of New Hampshire at 8 (1983).

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[16] Children who have been the subject of nude or sexually explicit photographs have a privacy interest in having the photographs shielded from the view of others. *Ferber*, 458 U.S. at 759 n.10. *See, e.g., Faloona v. Hustler*, 607 F. Supp. 1341 (N.D. Tex. 1985) (children have privacy interest in release for publication of nude photographs), *aff'd*, 799 F.2d 100 (5th Cir. 1986), *cert. denied*, 107 S. Ct. 1295 (1987); *Shields v. Gross*, 461 N.Y.S.2d 254, 448 N.E.2d 108 (1982) (same).

The nude or sexually explicit photographs that result from the sexual exploitation of children are also harmful in that they condone and promote a distorted view of sexuality, often by pairing the themes of sexuality and violence. For example, it has been documented that the three most widely-read, mainstream "soft-core" erotica/pornography magazines, *Playboy*, *Penthouse*, and *Hustler*, depict children in both sexual and nonsexual ways, depict sexual and nonsexual crime and violence, and commonly pair these themes with images of adult female nudity and overt sexual activity. U.S. Dept. of Justice, Office of Juv. Justice and Delinquency Prevention, Exec. Summ., Pro. No. 84-JN-AX-K007 (1987) (hereinafter "Executive Summary").[17] The principal researcher also found that children were depicted as viable targets of sexual and nonsexual abuse and as desiring adult sexual interactions. The report concluded:

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[17] The study identified three basic themes: nonsexual, nonviolent activities such as simple memories; violent activities such as murder, maiming or surgical procedures; and sexual activities such as intercourse or a child appearing nude . . . .

Findings included the following:

* 1.675 child images were associated with nudity.

* 1,225 child images were associated with genital activity.

* 989 child images were associated with adults.

792 adults were portrayed as pseudo-children.

* 592 child images were associated with force.

* 267 child images were associated with sex with animals or objects.

* 51% of the child cartoons and 46% of the child photographs showed children age 3-11.

. . .

* Almost all depictions of child sexual abuse portrayed the child as unharmed or benefited by the activity.

From 1954 to 1984, these 6,004 images of children were interspersed with 15,000 images of crime and violence, 35,000 female breasts and 9,000 female genitalia. Executive Summary at 3.



> [I]t appears of compelling public concern that the present research documents a contextual association of three discrete stimuli: (1) adult female nudity and graphic female sexual display, (2) neutral, sexual and violent child depictions, and (3) depictions of crime and violence. The magazine genre evidences a unified culture and world view which incorporates all three stimuli: pairing the arousal to an adult sexual object with child sexualization and crime and violence. Thus it is not unlikely that some vulnerable juvenile and adult receivers may fuse child depictions with arousal to sex (genital stimulus) and/or arousal to violence (aggressive stimulus).

Executive Summary at 9-10. The findings were disturbing enough that the author of the report recommended a voluntary moratorium of child depictions by mainstream erotica/pornography publications until more data on the harm to children could be obtained and evaluated. *Id.* at 10.

The photographic record of the sexual exploitation of the child is also harmful in that such photographs often are used by pedophiles[18] to lower other children's inhibitions.[19] "Peer pressure has a tremendous effect on chil-

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[18] The term pedophilia is defined by the American Psychiatric Association as "the act or fantasy of engaging in sexual activity with pre-pubertal children as a repeatedly preferred or exclusive method of achieving sexual excitement." American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders III*, Revised Third Edition § 302.20 (1987). Webster's New Collegiate Dictionary at 838 (1979) defines the term as "sexual perversion in which children are the preferred sexual object." Many child molesters are pedophiles and many pedophiles are child molesters, but the terms are not interchangeable. Lanning, *Child Molesters: A Behavioral Analysis, supra* at 1-2.

[19] The pedophile's fascination with child pornography admits of no distinction between photographs of children in sexually explicit positions or in a state of nudity. Typically, pedophiles take and use photographs of children in both sexual and nonsexual poses. Lanning and Burgess, *Child Pornography and Sex Rings*, Fed. Bur. Inv. Law Enforcement Bull. at 13 (1984) and both unclothed and

dren . . . [i]f other children are involved, maybe it is all right, the child thinks. In the pornography used to lower inhibitions, the child portrayed will appear to be having a good time." *Effect of Pornography on Women and Children*, 1984: Hearings on S. Hrg. 98-1267 Before the Subcomm. on Juv. Justice, 98th Cong., 2d Sess. at 38 (1984) (testimony of Kenneth V. Lanning). Further, in most cases coming to the attention of law enforcers, "the arousal and fantasy fueled by the pornography is only a prelude to actual sexual activity with children." A.W. Burgess, *Child Pornography and Sex Rings* at 86 (1984).

In summary, whether the photograph depicts the child in a sexually explicit position, in a position that suggests sexual activity, or in a state of nudity, the photograph is an instrument of sexual exploitation as well as an indication that sexual exploitation has occurred.

**C. Section 29A Is A Child Sexual Exploitation Statute, Enacted As Part Of An Overall Scheme To Protect The Commonwealth's Children, Which Reflects The Realities of Child Sexual Abuse.**

Section 29A provides:

> whoever . . . hires, coerces, solicits or entices, employs, procures, uses, causes, encourages, or knowingly permits a child to pose or be exhibited in a state of nudity or to participate or engage in any act that depicts, describes or represents sexual conduct for purposes of visual representation . . . [shall be punished . . . .]

The statute is part of an overall scheme of laws designed to protect children from sexual abuse and exploitation

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clothed, Sen. Comm. of Governmental Affairs, Perm. Sub. Comm., 99th Cong., 2d Sess., Rep. No. 99-537, Child Pornography and Pedophelia at 11 (1986).



such as rape, incest, and prostitution that the state could enact pursuant to its police powers.[20]

The tenor and focus of section 29A is the regulation of conduct that sexually exploits children.[21] The statute is not primarily concerned with the effect of child pornography upon the viewer.[22] Rather, it addresses the mental and physical well-being of children who are used as models and subjects of pornography. *Cf. Ferber*, 458 U.S. at 761 (whether the work "appeals to the prurient interest of the average person bears no connection to the issue of whether a child has been physically or psychologically harmed in the production of the work"); *United States v. Freeman*, 806 F. 2d 1290, 1292 (8th Cir.)

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[20] *See, e.g.*, Mass. Gen. Laws Ann. ch. 265, § 13B (indecent assault and battery of a child under fourteen); Mass. Gen. Laws Ann. ch. 265, § 14 (indecent assault and battery of a child of fourteen); Mass. Gen. Laws Ann. ch. 265, § 22A (rape of a child under sixteen, with force); Mass. Gen. Laws Ann. ch. 265, § 23 (rape of a child under sixteen); Mass. Gen. Laws Ann. ch. 265, § 24B (assault with intent to rape a child less than sixteen); Mass. Gen. Laws Ann. ch. 265, § 26A (kidnapping of a relative); Mass. Gen. Laws Ann. ch. 272, § 1 (enticement of child under sixteen for marriage); Mass. Gen. Laws Ann. ch. 272, § 4 (inducement of child under eighteen for sexual intercourse); Mass. Gen. Laws Ann. ch. 272, § 4B (inducement of child under eighteen to become a prostitute); Mass. Gen. Laws Ann. ch. 272, § 28 (dissemination of obscene materials to minors); Mass. Gen. Laws Ann. ch. 272, § 29B (dissemination of child pornography); Mass. Gen. Laws Ann. ch. 272, § 35A (unnatural or lascivious acts with a child under sixteen); Mass. Gen. Laws Ann. ch. 272, § 33 (exhibition of deformed minor); Mass. Gen. Laws Ann. ch. 119, § 51B (reporting of child abuse).

[21] In contrast, the focus of a companion statute, Mass. Gen. Laws Ann. ch. 272, § 29B (West Supp. 1987) is the prevention of the sexual exploitation of minors through the regulation of the distribution of child pornography.

[22] But child pornography may indeed have a harmful effect on viewers—either potential abusers or children they are attempting to manipulate. *See supra* pp. 21-24; *cf. Erzoznick v. City of Jacksonville*, 422 U.S. 205, 213 (1973).

("Whereas obscenity laws are designed to protect the unwilling recipient from offensive sexual depictions (citation omitted) child pornography laws also seek to protect innocent children from sexual exploitation and its potentially permanent psychological and physical effects"), *cert. denied*, 107 S. Ct. 1384 (1987).

Section 29A seeks to prevent sexual exploitation by prohibiting the hiring, coercing, soliciting, or enticing of a child to pose in a state of nudity or to engage in sexual activity for the purpose of producing a visual representation. The verbs chosen to describe the conduct that is proscribed describe exploitive conduct, not speech. The verbs in section 29A parallel those describing the conduct proscribed in other child exploitation statutes, for example: "*enticement* of child under 16 for marriage," Mass. Gen. Laws Ann. ch. 272, § 1; "*inducement* of child under 18 to become a prostitute," Mass. Gen. Laws Ann. ch. 272, § 4B; "*employment* of child under fifteen to beg," Mass. Gen. Laws Ann. ch. 272, § 58 (emphasis added). The statute includes sanctions against "whoever," including parents, "knowingly permits" the child to pose in a state of nudity or to participate in sexual acts. This language, like its federal counterpart, is aimed at preventing those with parental or custodial control from knowingly permitting the abuse of a child by another.[23] As with all of the other phrases which describe the conduct that is prohibited under section 29A, this prohibition reflects the state's concern that the immaturity of minors not be damagingly exploited for the gratification or profit of another person.

The history of the statute's enforcement indicates that the statute reflects the reality of child sexual abuse. *See*

[23] *See* 18 U.S.C. § 2251(b) (West 1984) ("any parent, legal guardian, or person having custody or control of a minor who knowingly permits such minor to engage in, or to assist any other person to engage in sexually explicit conduct for the purpose of producing any visual depiction of such conduct shall be punished").



*infra* pp. 29-31. Indictments under section 29A typically arise in conjunction with indictments for other sexual offenses such as rape of a child and indecent assault and battery, and not in isolation.[24] Twenty-six out of the twenty-nine known cases for which indictments under section 29A were returned were accompanied by charges of rape of a child or indecent assault and battery of a minor, or both. *See* Appendix, pp. 1a-8a.

Thus as a practical, historical, and empirical matter, section 29A covers a whole range of conduct that is "easily identifiable and constitutionally proscribable." *Ferber*, 458 U.S. at 770 n.25. Both on its face and in its practical application, the essential scope of the statute's "sweep" in combatting sexual exploitation of minors is "plainly legitimate." *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973).

## III. THE CONCEIVABLE MARGINAL INFRINGEMENTS OF SPEECH INTERESTS HYPOTHESIZED BY THE COURT BELOW ARE UNREALISTIC AND DO NOT PRESENT A SERIOUS THREAT TO FIRST AMENDMENT EXPRESSION.

The lower court in the present case was overwhelmingly and unjustifiably concerned that section 29A could be read as prohibiting benign parental pictures of young naked children, or the use of child models in the production of "some of the world's greatest paintings." *Oakes*, 401 Mass. at 605 n.3, 518 N.E.2d at 838 n.3. Neither concern justifies invalidating the statute on its face.

[24] One Massachusetts study of child sexual abuse victims indicates that seventy-four percent of the victims studied were subjected to more than one form of abuse; that three percent of the girls and six percent of the boys were forced to pose for child pornography; and that thirteen percent of the girls and forty percent of the boys were forced to watch pornography. Department of Social Services, MA, Report, Services to Sexually Abused Children And Their Families, Part II at 20 (1987).

The purpose of the First Amendment overbreadth doctrine is to avoid the chilling effect that broadly worded statutes can have upon the exercise of freedom of expression. *Ferber*, 458 U.S. at 768. That purpose is not served, however, where the threat of a chilling effect is neither real nor substantial. *Id.* at 769-70; *see supra* pp. 9-15. To strike down a statute which protects the state's citizens against child exploitation without any tangible impact upon First Amendment values constitutes a perversion of the overbreadth doctrine and serves no legitimate purpose.

In this case, the unreality of the court's suggestion that the statute might be used to prosecute benign family-album photographs of infants or toddlers is obvious, and the application of the statute to legitimate artistic expression is entirely theoretical. The plain intent of section 29A, particularly when read in context, *see supra* pp. 24-27, is to prohibit the production of child pornography and the coercive or manipulated sexual exploitation of children.[25]

The opinion below itself recognized that *nobody* would think that taking family-album-type pictures of infants and toddlers was unlawful, *Oakes*, 401 Mass. at 605, 518 N.E.2d at 838; the necessary corollary of this indisputable observation is that the statute does *not*, in fact, have a chilling effect upon such benign conduct. The concern of the majority below with respect to the possibility of chilling artistic expression is similarly unfounded.[26] Section 29A includes a statutory defense which expressly protects a "visual presentation or production of any posture or exhibition in a state of nudity . . . produced . . . for a bona fide scientific or medical purpose, or for an educational or cultural purpose for a bona fide school, museum or library." Mass. Gen. Laws Ann. ch. 272, § 29A (West Supp. 1987)."[27] Section 29A involves child pornography and the sexual exploitation of children, not legitimate artistic expression.

Moreover, the statute's enforcement history belies any notion that the Commonwealth or its prosecutors have had any difficulty in interpreting section 29A well within constitutional boundaries. The petitioner is aware of no cases in Massachusetts that involve prosecutions under section 29A for the taking of innocent family-album-type photographs of children or anything resembling legitimate art. In addition, available statistics establish that section 29A has been used only to prohibit the production of photographs that engender a serious likelihood of harm to children. *See* Appendix; *see also supra* pp. 26-27.[28] As this Court has made clear, it is relevant in a First Amendment challenge to consider how a statute has been applied. *See Brockett v. Spokane Arcades, Inc.*, 472 U.S.

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[25] As this Court recently affirmed, where a governmental regulation permits some ambiguous construction, the goals of the regulation may illuminate its likely application. *Frisby v. Schultz*, 56 U.S.L.W. 4785, 4788 (U.S. June 29, 1988). Similarly, in *Boos v. Barry*, this Court held that a First Amendment vagueness challenge was not established where, as here, "the particular context" of the statute "communicates its reach in words of common understanding." 56 U.S.L.W. 4254, 4260 (U.S. March 22, 1988); *see also Grayned v. Rockford*, 408 U.S. 104, 112 (1972) (particular context of ordinance regulating disturbance of the peace in schools gave fair notice of its scope).

[26] *Cf. Ferber*, 458 U.S. at 773. Although the definition of child sexual exploitation and pornography in section 29A is slightly more expansive than in the statute at issue in *Ferber*, First Amendment concerns are more attenuated here because section 29A regulates production rather than dissemination. *See supra* pp. 16-17 n.11.

[27] The jury were expressly instructed on this defense but necessarily rejected it when they convicted Oakes. *See infra* p. 33.

[28] Thus, prosecutors have applied the statute only to the type of conduct reflected in its title, "Child Pornography; Enticement, Solicitation, Employment, etc. of Children." Mass. Gen. Laws ch. 272, § 29A (1986). *See also* J.A. at 3a (title on indictment: "Soliciting A Child for Pornographic Purposes").

491, 503 (1985) (citing *Cantwell v. Connecticut*, 310 U.S. 296 (1940) and *Marsh v. Alabama*, 326 U.S. 501, 509 (1946)). *See also Frisby*, 56 U.S.L.W. at 4788 (accepting the representations of town counsel made during oral argument regarding the town's limited intent to enforce as supportive of the Court's disinclination to view the challenged ordinance as fatally overbroad); *Lakewood v. Plain Dealer Publishing Co.*, 56 U.S.L.W. 4611, 4617 n.11 (U.S. June 14, 1988) (well-understood enforcement practice relevant in construing statute even where limits imposed by practice are not evident on face of statute).[29]

For all these reasons, to the extent that section 29A is potentially overbroad in any of its applications, such potential applications would amount to no more than a small fraction of the conduct within the statute's reach. *Cf. Ferber*, 458 U.S. at 773. This, like *Ferber*, presents "the paradigmatic case of a state statute whose legitimate reach dwarfs its arguably impermissible applications." *Id.*[30]

Neither "the text of the law" nor "actual fact," *New York State Club Association*, 56 U.S.L.W. at 4657, support the conclusion that "a substantial number of in-

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[29] In this case, it is not necessary to rely on a mere "hunch" that the state will "probably not enforce" the statute against individuals who take innocuous photographs. *Cf. Frisby*, 56 U.S.L.W. at 4792 (Stevens, J., dissenting). Rather, the Court may rely upon the history of enforcement for the proposition that the statute is being enforced in cases where sexual exploitation is thought to be present. *See supra* pp. ———.

[30] On July 15, 1988, the Massachusetts General Court enacted, subject to the Governor's signature, H. 5555, an amendment to section 29A. However, this amendment is not certain to validate pre-*Oakes* convictions or reach conduct that occurred before enactment of the amendment. *See Weaver v. Graham*, 450 U.S. 24, 28-29 (1981); Sutherland Statutory Construction § 2.07 nn.9, 15-18 (4th ed. 1985). *Cf. Frisby*, 56 U.S.L.W. at 4792 (Stevens, J., dissenting).



stances exist in which the law cannot be applied constitutionally." *Id.* Had the court below properly applied the overbreadth doctrine, it would have been compelled to conclude that potential overbreadth could be cured through case-by-case adjudication. Plainly, the conceivable marginal infringements on speech interests the court hypothesized do not justify striking down section 29A as invalid on its face.

## IV. THE RESPONDENT'S CONDUCT IN TAKING NUDE PHOTOGRAPHS OF HIS FOURTEEN-YEAR-OLD STEPDAUGHTER WAS SEXUALLY EXPLOITIVE, CRIMINAL, AND FELL WELL WITHIN A PERMISSIBLE RANGE OF APPLICATIONS OF G.L. ch. 272, SECTION 29A.

It remains only to consider whether the conduct of respondent Oakes was criminal, sexually exploitive, and fell within the scope of activity that section 29A constitutionally prohibits.[31] Little serious doubt on this point should linger.

The photographs depict a fourteen-year-old girl, nude, wearing only a red scarf and red and white bikini underpants, and in Playboy-type poses selected by the respondent. Tr. 24-26, 28; J.A. 20a-23a, 24a-25a; *see also* Exhibits 1-10. All of the photographs emphasize the vic-

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[31] The majority below expressly did not decide whether Oakes could constitutionally be punished for taking the sexually suggestive nude photographs of his fourteen-year-old stepdaughter in secret. *Oakes*, 401 Mass. at 603, 518 N.E.2d at 837 ("We need not decide whether the Supreme Court would sustain a statute that was carefully directed against the defendant's conduct . . ."); *id.* at 604, 518 N.E.2d at 837 ("There is at least a substantial question whether an important governmental interest would warrant overriding First Amendment freedoms in this case . . ."); *id.* at 604, 518 N.E.2d at 837 ("Even if we assume that an important governmental interest would justify punishment for the defendant's behavior in this case . . ."); *id.* at 605, 518 N.E.2d at 838 ("[E]ven if what the defendant did in this case could properly be criminalized (a matter we need not decide)").

tim's breasts. In some, she is depicted leaning back so that her breasts are the focal point of the photograph. The poses, chosen by Oakes, are obviously contrived and are either sexual or sexually suggestive. They do not depict the way a child ordinarily sits, reclines, or is positioned for a photograph. In some of the photographs, the victim assumes a coy or sexually suggestive attitude. The nature of the activity is clearly one that the statute is designed to reach and would meet, by analogy, a "lewd" or "lascivious" test.[32]

Second, the photographs caused the victim humiliation and embarrassment. When she saw them she tore them up and threw them away in the woods. Oakes, however, forced her to retrieve them and then lay them on the kitchen table to dry. Tr. 27; J.A. 24a.

Third, in order to convict, the jury had to find that there was no legitimate purpose for the photographs. The jury rejected any suggestion that Oakes took the nude photographs for a legitimate educational, cultural, scientific, or medical purpose when it convicted Oakes. *See* Jury Instructions, Tr. 104; J.A. 13a. The victim had been told that she needed a portfolio of photographs of herself in clothes—skirts and dresses—and she had

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[32] *Cf. United States v. Smith*, 795 F.2d 841, 844 (9th Cir. 1986) (photographs of teenagers in various stages of nudity constituted "lascivious exhibition of the genitals" within the meaning of federal child pornography statute, 18 U.S.C. § 2255); *United States v. Dost*, 636 F. Supp. 828 (S.D. Cal. 1986) (nude photographs of ten-year-old girl on the beach and of fourteen-year-old in a variety of positions displaying breasts and genitals were "lascivious" within meaning of 18 U.S.C. § 2255), *aff'd sub nom. United States v. Wiegand*, 812 F.2d 1239 (9th Cir. 1987); *United States v. Nemuras*, 567 F. Supp. 87, 89 (D. Md. 1983) (photographs of nude or partially clothed children posed in such a way as to depict or suggest willingness to engage in sexual activity constituted a "lewd exhibition of genital area"), *aff'd*, 740 F.2d 286 (4th Cir. 1984); *People v. Lerch*, 134 Ill. App. 3d 643, 89 Ill. Dec. 510, 480 N.E. 2d 1253, 1259 (1985) (photographs of child in which genitals were fully exposed and were focal point of photograph and where poses were contrived, were lewd).



hired a professional photographer to prepare one. Tr. 30, 40; J.A. 27a-28a, 37a-38a. The photographer told Oakes to take photographs of the victim in one-piece outfits, not bikinis. Tr. 62. Nevertheless, Oakes began to take photographs of the victim in increasingly revealing states of undress including clothes from Fredericks of Hollywood. Tr. 24-25, 37, 68; J.A. 21a, 34a-35a. Ultimately, he took the photographs of the victim nude (Tr. 25; J.A. 22a), telling her that he wanted to "make [her] big for Playboy." Tr. 28; J.A. 25a.

Finally, the photographs were produced under circumstances involving coerciveness, secrecy, and enticement, the very circumstances that the statute seeks to regulate. Although the victim's mother knew that Oakes was taking photographs of the victim clothed, she did not know about the nude photographs. Tr. 37; J.A. 34a. The photographs were taken secretly in the basement and kept hidden from view. They were not put in the victim's portfolio but were kept in a locked safe (Tr. 45; J.A. 43a) and in a false ceiling in the basement. Tr. 36; J.A. 34a.

It is telling that Oakes did not, at trial, try to defend the propriety of his conduct. No suggestion was raised nor did the jury find that there was anything benign or artistic about his conduct. Tr. 57-61. Instead, his defense was that he never took these photographs. Tr. 58.

These facts make clear that section 29A is constitutional as applied to Oakes. This was conduct that the state can legitimately criminalize and that bears no resemblance to the marginal applications of the statute hypothesized by the court below.

## CONCLUSION

For the foregoing reasons, the judgment of the Supreme Judicial Court should be reversed and the conviction should be reinstated.

Respectfully submitted,

JAMES M. SHANNON *
Attorney General
Commonwealth of Massachusetts

PHYLLIS N. SEGAL
A. JOHN PAPPALARDO
Deputy Attorneys General

MADELYN F. WESSEL
JUDY G. ZEPRUN
H. REED WITHERBY
Assistant Attorneys General
One Ashburton Place, Rm. 2001
Boston, Massachusetts 02108
Tel.: 617-727-2200

* Counsel of Record

DATED: July 21, 1988

# APPENDIX

# APPENDIX

The following information was obtained in a survey conducted by the Attorney General about prosecutions under Mass. Gen. Laws ch. 272, § 29A since its enactment .

## I. *PLYMOUTH COUNTY*

| *Ind. No.* | *Charge* * | *Disposition* * |
|---|---|---|
| *Defendant 1* | | |
| 84612 | Rape/Child/Force | Pending |
| 84613 | Rape/Child/Force | Pending |
| 84614 | Rape/Child/Force | Pending |
| 84615 | Ind A&B/U/14 | Pending |
| 84618 | Rape/Child | Pending |
| 84619 | 272, § 29A | Pending |
| *Defendant 2* | | |
| 82172 | 272, § 29A | life, 10 yrs, ss prob.; App. Div.: 6-20, CJ |
| 82173 | 272, § 29A | 10-20, CJ |
| 82174 | 272, § 29A | 10-20, CJ |
| 82175 | 272, § 29A | 10-20, CJ |
| 82176 | Ind A&B | 9-10, CJ |
| 82177 | 272, § 29A | 9-10, CJ |
| 82178 | 272, § 29A | 9-10, CJ |
| 82179 | 272, § 29A | 7-9, CJ, all sentences to be served conc w 82172 |
| *Defendant 3* | | |
| 83346 | Rape/Child/Force | life, CJ |
| 83347 | A&B | |
| 83348 | Rape/Child | 30-50, CJ, conc w life |
| 83349 | Ind A&B | 3-5, CJ, conc w life |
| 83350 | Rape/Child | 30-50, CJ, consec to life |
| 83351 | Ind A&B | n/p mid-trial |
| 83352 | Rape | n/p mid-trial |
| 83353 | Rape (2 cts) | (1) 7-10 conc; (2) N/G |
| 83354 | Ind A&B | 3-5, CJ, conc |
| 83355 | Rape/Child | 30-50, CJ, conc |
| 83356 | 272, § 29A | dismissed under *Oakes* |
| 83357 | Ind A&B | 3-5, CJ, conc |
| 83358 | Ind A&B | 3-5, CJ, conc |
| 83359 | Ind A&B | 3-5, CJ, conc |

* Explanation of abbreviations appear on pp. 9a-10a.

| *Ind. No.* | *Charge* | *Disposition* |
|---|---|---|
| 83360 | Ind A&B | 3-5, CJ, conc |
| 83382 | Ind A&B | 3-5, CJ, conc |

II. *BRISTOL COUNTY*

*Defendant 4*

| | | |
|---|---|---|
| 16641 | Rape/Child | filed w/o ch. plea |
| 16642 | Ind A&B/U/14 | G; 2½ HC, 1 to be served; 3 yrs prob. |
| 16643 | 272, § 29A | filed w/o change of plea |
| 16644 | poss. class D | filed w/o ch. plea |

*Defendant 5*

| | | |
|---|---|---|
| 18120 | Rape/Child (2 cts) | G; 12-15, CJ |
| 18121 | Ind A&B/U/14 (3 cts) (second offense) | G; 12-15, CJ, conc |
| 18122 | Dissemination of Matter Harmful to Minor | n/p |
| 18123 | 272, § 29A | n/p |

*Defendant 6*

| | | |
|---|---|---|
| 17466 | Rape/Child (2 cts) | 4 yrs prob. |
| 17467 | Ind A&B/U/14 | 4 yrs prob. |
| 17469 | Unnat'l Act w/Child (2 cts) | 4 yrs prob. |
| 17470 | Ind A&B | 4 yrs prob. |
| 17468 | 272, § 29A | n/p |

*Defendant 7*

| | | |
|---|---|---|
| 17780 | Rape/Child | G; 3-5, CJ, 3 yrs prob. |
| 17781 | Ind A&B/U/14 (2 cts) | 3-5, CJ, conc |
| 17782 | 272, § 29A | filed w/o ch. of plea |

*Defendant 8*

| | | |
|---|---|---|
| 17420 | 272, § 29A | Defendant in Default |

III. *BERKSHIRE COUNTY*

*Defendant 9*

| | | |
|---|---|---|
| 17270 | Rape/Child | G; 2½HC |
| 17271 | Ind A&B/U/14 | G; 2½HC |



| *Ind. No.* | *Charge* | *Disposition* |
|---|---|---|
| 17272 | Ind A&B/U/14 | G; 2½HC |
| 17273 | Ind A&B/U/14 | G; 2½HC |
| 17274 | Ind A&B/U/14 | G; 2½HC |
| 17275 | Ind A&B/U/14 | G; 2½HC |
| 17276 | Ind A&B/U/14 | G; 2½HC |
| 17277 | Ind A&B/U/14 | G; 2½HC |
| 17278 | Ind A&B/U/14 | G; 2½HC |
| 17279 | Ind A&B/U/14 | G; 2½HC |
| 17280 | Ind A&B/U/14 | G; 2½HC |
| 17281 | Ind A&B/U/14 | G; 2½HC (all sentences conc w 17270) |
| 17282 | 272, § 29B | G; placed on file |
| 17283 | 272, § 29A | 10-12, CJ, ss, 3 yrs prob., on and after 17271 |
| 17284 | 272, § 29A | 10-12, CJ, ss, 3 yrs prob , conc w 17283 |
| 17285 | Asslt w/Int Rape | G; placed on file |
| 17286 | A&B | G; placed on file |

*Defendant 10*

| | | |
|---|---|---|
| 17090 | 272, § 29A | 1 yr inf. prob. |
| 17091 | 272, § 29A | 1 yr inf. prob. |
| 17965 | Rape | 5-7, CJ |
| 17966 | Rape | 5-7, CJ |
| 17967 | 272, § 29A | 10-12, CJ, ss, w 2 yrs prob. |
| 17968 | 272, § 29A | same, conc |
| 17969 | 272, § 29A | same |
| 17970 | open + gross lewdness | 2½-2-3, CJ, conc w 17965 |
| 17971 | same | same |
| 17972 | Ind A&B/U/14 | 5-7, CJ, conc w 17965 |
| 17973 | Ind A&B/U/14 | same |
| 17974 | Ind A&B/U/14 | same |

IV. *MIDDLESEX COUNTY*

*Defendant 11*

| | | |
|---|---|---|
| 86-2140 | Rape/Child/Force | 20 yrs/Concord |
| 86-2141 | Rape/Child/Force | Dism. |
| 86-2142 | Rape/Child/Force | 20 yrs/Concord, conc |
| 86-2143 | Rape/Child/Force | 20 yrs/Concord, conc |
| 86-2144 | Ind A&B/U/14 | 10 yrs/Concord, conc |
| 86-2145 | Ind A&B/U/14 | 10 yrs/Concord, conc |
| 86-2146 | Ind A&B/U/14 | 10 yrs/Concord, conc |
| 86-2147 | 272, § 29A | G; placed on file |

| *Ind. No.* | *Charge* | *Disposition* |
|---|---|---|
| *Defendant 12* | | |
| 87-1132 | Rape | 15-20, CJ |
| 87-1133 | Rape | 15-20, CJ, conc |
| 87-1134 | Rape/Child | filed w/o change of plea |
| 87-1135 | 272, § 29A | filed w/o change of plea |
| *Defendant 13* | | |
| 86-2659 | Rape/Child/Force (11 cts) | NG |
| 86-2660 | Ind A&B/U/14 (6 cts) | 1 yr H/C |
| 86-2661 | Kidnapping (2 cts) | NG |
| 86-2662 | A&B (6 cts) | NG |
| 86-2663 | 272, § 29A (2 cts) | NG |
| *Defendant 14* | | |
| 87-1328 | Rape/Child | 6-10, CJ |
| 87-1329 | Ind A&B/U/14 | 6-10, CJ, conc |
| 87-1330 | 272, § 29A | NG |
| 87-1331 | Distribution of Obscene Material | NG |
| *Defendant 15* | | |
| 86-1976 | Rape/Child/Force (3 cts) | 7-10, CJ, ss 3 yrs on and after |
| 86-1977 | Ind A&B/U/14 (2 cts) | 2½ yrs H/C, cmtd |
| 86-1978 | Ind A&B (2 cts) | filed w/o change of plea |
| 86-1979 | Open & Gross (3 cts) | filed w/o change of plea |
| 86-1980 | Unnat'l Act (3 cts) | filed w/o change of plea |
| 86-1981 | 272, § 29A | filed |
| *Defendant 16* | | |
| 86-4076 | Rape/Child | Pending |
| 86-4077 | Rape/Child/Force | Pending |
| 86-4078 | Ind A&B/U/14 | Pending |
| 86-4079 | 272, § 29A | Pending |
| *Defendant 17* | | |
| 87-2074 | Rape/Child/Force | Pending |
| 87-2075 | Rape/Child/Force | Pending |
| 87-2076 | Ind A&B/U/14 | Pending |



| *Ind. No.* | *Charge* | *Disposition* |
|---|---|---|
| 87-2077 | Ind A&B/U/14 | Pending |
| 87-2078 | 272, § 29A | Dismissed |
| 87-2079 | 272, § 29A | Dismissed |
| 87-2080 | Drugging for Sexual Int. | Pending |
| 87-2081 | Drugging for Sexual Int. | Pending |
| 87-2082 | Rape/Child/Force | Pending |
| 87-2083 | Rape/Child/Force | Pending |
| 87-2084 | Ind A&B/U/14 | Pending |
| 87-2085 | Ind A&B/U/14 | Pending |
| 87-2086 | Drugging for Sexual Int. | Pending |
| *Defendant 18* | | |
| 87-3532 | Rape/Child/Force | Pending |
| 87-3533 | Rape/Child/Force | Pending |
| 87-3534 | Rape/Child/Force | Pending |
| 87-3535 | Rape/Child/Force | Pending |
| 87-3536 | Ind A&B/U/14 | Pending |
| 87-3537 | Ind A&B/U/14 | Pending |
| 87-3538 | Ind A&B/U/14 | Pending |
| 87-3539 | Ind A&B/U/14 | Pending |
| 87-3540 | 272, § 29A | Dismissed |
| 87-3541 | 272, § 29A | Dismissed |
| 87-3542 | 272, § 29A | Dismissed |
| 87-3543 | 272, § 29A | Dismissed |
| 87-3544 | Drugging for Sexual Intercourse | Pending |
| 87-3545 | Drugging for Sexual Intercourse | Pending |
| 87-3546 | Drugging for Sexual Intercourse | Pending |
| 87-3547 | Drugging for Sexual Intercourse | Pending |
| *Defendant 19* | | |
| 85-3785 | Rape/Child | Pending |
| 85-3786 | 272, § 29A | Pending |

V. *NORFOLK COUNTY*

| | | |
|---|---|---|
| *Defendant 20* | | |
| 84001 | Rape/Child | 20-25, CJ |
| 84002 | Rape/Child | 20-25, CJ, ss, consec to 84001 |
| 84003 | Rape/Child | NG |

| *Ind. No.* | *Charge* | *Disposition* |
|---|---|---|
| 84004 | Rape/Child | 20-25 CJ, conc w 84002 |
| 84005 | 272, § 29A | 10-12 CJ, conc w 84001 |
| 84006 | 272, § 29A | 10-12 CJ, conc w 84001 |
| 84007 | Ind A&B/U/14 | 6-10 CJ, conc w 84002 |
| 84008 | Ind A&B/U/14 | NG |
| 84009 | Ind A&B/U/14 | 6-10, CJ, conc |
| 84010 | Ind A&B/U/14 | NG |
| 84011 | Ind A&B/U/14 | 6-10, CJ, conc |
| 84012 | A W Int Rape | 6-10, CJ, conc |
| 84013 | A&B | NG |
| 84014 | A&B | NG |
| *Defendant 21* | | |
| 84015 | Rape/Ch/Force | 5-10, CJ |
| 84016 | Rape/Ch/Force | NG |
| 84017 | Rape | 12-15, CJ, ss, 5 yrs prob., consec to 84015 |
| 84018 | Ind A&B | 9-10, CJ, ss, conc w 84015 |
| 84019 | Ind A&B | 9-10, CJ, ss, conc w 84015 |
| 84020 | 272, § 29A | 10-12, CJ, ss, conc w 84015 |
| 84021 | 272, § 29A | 10-12, CJ, ss, conc w 84015 |
| 84022 | A&B | NG |
| 84023 | 272, § 29A | conviction secured |

VI. *HAMPSHIRE COUNTY*

*Defendant 22*

| | | |
|---|---|---|
| 85-178 | 272, § 29A (2 cts) | (1) G Plea-10-12 yrs, MCI, CJ ss for 5 years; (2) filed |
| | 272, § 29B | filed |

VII. *WORCESTER COUNTY*

*Defendant 23*

| | | |
|---|---|---|
| 87-0337 | 272, § 29A | Guilty Plea |
| 87-0338 | 272, § 29A | Guilty Plea |
| 87-0339 | 272, § 29A | Guilty Plea |
| 87-0340 | 272, § 29A | Guilty Plea |
| 87-0341 | 272, § 29A | Guilty Plea |
| 87-0342 | 272, § 29A | Guilty Plea |
| 87-0343 | 272, § 29A | Guilty Plea |
| 87-0344 | 272, § 29A | Guilty Plea |
| 87-0345 | 272, § 29A | Guilty Plea |
| 87-0346 | 272, § 29A | Guilty Plea |



| *Ind. No.* | *Charge* | *Disposition* |
|---|---|---|
| *Defendant 24* | | |
| 87-107246 | 272, § 29A | G; 10 yrs Concord |
| 85-107247 | Rape/Child | NG |
| 85-107248 | Rape/Child | NG |
| 85-107249 | Rape/Child | NG |
| 85-107250 | Rape/Child | NG |

VIII. *SUFFOLK COUNTY*

No cases found.

IX. *BARNSTABLE COUNTY*

No cases found.

X. *ESSEX COUNTY*

*Defendant 25*

| | | |
|---|---|---|
| 8561 | Rape/Child | GP, 8-12, CJ |
| 8563 | Rape/Child | GP, 8-12, CJ |
| 8565 | Rape/Child | GP, 8-12, CJ |
| 8567 | Rape/Child | GP, 8-12, CJ |
| 8569 | Rape/Child | GP, 8-12, CJ |
| 8571 | Rape/Child | GP, 8-12, CJ<br>all sentences conc w 8561 |
| 8560 | 272, § 29A | GP, 10-15, CJ, ss, 5 yrs prob. |
| 8562 | 272, § 29A | GP, 10-15, CJ, ss, 5 yrs prob. |
| 8564 | 272, § 29A | GP, 10-15, CJ, ss, 5 yrs prob. |
| 8566 | 272, § 29A | GP, 10-15, CJ, ss, 5 yrs prob. |
| 8568 | 272, § 29A | GP, 10-15, CJ, ss, 5 yrs prob. |
| | (GP on § 29A cases withdrawn after *Oakes*) | |

*Defendant 26*

| | | |
|---|---|---|
| 10901 | Rape/Child | 6½-10, CJ |
| 10902 | Rape/Child | 6½-10, CJ, conc |
| 10903 | Ind A&B/U/14 | conc, ss |
| 10904 | 272, § 29A (8 cts) | 10-15, CJ |
| 10905 | 272, § 29A (6 cts) | 10-15, CJ |
| 10906 | 272, § 29A (8 cts) | 10-15, CJ<br>(all sentences conc w 10901) |

XI. *HAMPDEN COUNTY*

*Defendant 27*

| | | |
|---|---|---|
| 87-1077 | distribution of:<br>LSD to minor | mtn for req. finding allowed. |

| *Ind. No.* | *Charge* | *Disposition* |
|---|---|---|
| 87-1078 | cocaine to minor | same |
| 87-1079 | amphetamines to minor | same |
| 87-1080 | marijuana to minor | same |
| 87-1081 | hashish to minor | same |
| 87-1082 | 272, § 29B | same |
| 87-1083 | 272, § 29A | same |
| 87-1084 | contributing to delinquency of minor | dismissed |
| 87-1085 | Rape/Child/Force | mtn. for req. finding allowed |
| *Defendant 28* | | |
| 87-1322 | 272, § 29A | dismissed |
| 87-1905 | Rape/Child | pending; def. in default |
| 87-1906 | Rape/Child | pending; def. in default |
| 87-1907 | Ind A&B/U/14 | pending; def. in default |
| 87-1908 | Ind A&B/U/14 | pending; def. in default |
| 87-1909 | Ind A&B/U/14 | pending; def. in default |
| 87-1910 | Intimidating | pending; def. in default |
| 87-1911 | Intimidating | pending; def. in default |
| 87-1912 | Intimidating | pending; def. in default |
| 87-1318 | contributing to delinquency of minor | pending; def. in default |
| 87-1319 | contributing to delinquency of minor | pending; def. in default |
| 87-1320 | Rape/Child, 2d off | pending; def. in default |
| 87-1321 | distribution of cocaine to minor | pending; def. in default |
| 87-1322 | 272, § 29B | pending; def. in default |
| *Defendant 29* | | |
| 86-2565 | Rape/Child/Force | 22-27, CJ |
| 86-2567 | Rape/Child/Force | 22-27, CJ, conc w 2565 |
| 86-2568 | Rape/Child/Force | 22-27, CJ, conc w 2565 |
| 85-2574 | 272, § 29A | 18-20, CJ, conc w 2565 |
| 86-2575 | 272, § 29A | 18-20, CJ, conc w 2565 |
| 86-2576 | 272, § 29A | 18-20, CJ, conc w 2565 |
| 86-2577 | 272, § 29A | 18-20, CJ, conc w 2565 |
| 86-2578 | 272, § 29A | 18-20, CJ, conc w 2565 |
| 86-2579 | 272, § 29A | 18-20, CJ, conc w 2565 |
| 86-2580 | 272, § 29A | 18-20, CJ, conc w 2565 |



*ABBREVIATIONS*

| *Charge* | *Statute* |
|---|---|
| Ind A&B/U/14 | Indecent Assault and Battery of a Child Under 14; Mass. Gen. Laws ch. 265, § 13B |
| Ind A&B | Indecent Assault and Battery; Mass. Gen. Laws ch. 265, § 13H |
| Rape/Child/Force | Forcible Rape of a Child; Mass. Gen. Laws ch. 265, § 22A |
| Rape/Child | Rape of a Child; Mass. Gen. Laws ch. 265, § 23 |
| 272, § 29A | Soliciting Child for Pornography; Mass. Gen. Laws ch. 272, § 29A |
| 272, § 29B | Dissemination of Visual Material Depicting Minor; Mass. Gen. Laws ch. 272, § 29B |
| Dissemination of Matter Harmful to Minor | Dissemination of Matter Harmful to Minor; Mass. Gen. Laws, ch. 272, § 28 |
| Unnat'l Act w/Child | Unnatural Act Committed with Child; Mass. Gen. Laws ch. 272, § 35A |
| Asslt w/Int Rape | Assault with Intent to Rape; Mass. Gen. Laws ch. 265, § 24 |
| A&B | Assault and Battery; Mass. Gen. Laws ch. 265, § 13A |
| Open & Gross Lewdness | Mass. Gen. Laws ch. 272, § 16 |
| Drugging for Sexual Intercourse | Mass. Gen. Laws ch. 272, § 3 |
| Intimidating | Intimidation of a Witness; Mass. Gen. Laws ch. 268, § 13B |

| *Disposition* | |
|---|---|
| ss | suspended sentence |
| prob. | probation |
| inf. prob. | informal probation |
| CJ | defendant committed to sentence to be served at Mass. Corr. Inst. at Cedar Junction |
| Concord | defendant committed to sentence to be served at Mass. Corr. Inst. at Concord (the significance of being sentenced to Cedar Junction, the maximum security state prison, as opposed to other institutions has to do with parole eligibility dates and is a reflection of the seriousness of the offense committed by the defendant). |
| HC | House of Correction |
| ct | count |
| conc | sentence to be served concurrently |
| consec | sentence to be served consecutively |
| NG | not guilty |
| G | guilty |
| GP | guilty plea |
| N/P | indictment nolle prosequied |
| filed w/o ch. of plea | case filed without a change of plea |

Supreme Court, U.S.
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No. 87-1651

In The
# Supreme Court of the United States
October Term, 1988

COMMONWEALTH OF MASSACHUSETTS,
*Petitioner,*
v.
DOUGLAS L. OAKES,
*Respondent.*

On Writ of Certiorari to the Supreme Judicial Court of the Commonwealth of Massachusetts

## BRIEF FOR RESPONDENT

RICHARD J. VITA, ESQUIRE*
2 Oliver Street
Boston, MA 02109

JEFFREY L. BALER, ESQUIRE
2 Oliver Street
Boston, MA 02109
Tel: 617-426-6566

* Counsel of Record

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
or call collect (402) 342-2831

## QUESTIONS PRESENTED

I. DID THE COURT BELOW PROPERLY DEEM MASSACHUSETTS GENERAL LAW C. 272 § 29A INVALID ON ITS FACE BECAUSE ITS SWEEPING PROHIBITION AGAINST NUDITY PER SE PERMITS COUNTLESS IMPERMISSIBLE APPLICATIONS TO THE PROTECTED CONSTITUTIONAL ACTIVITIES OF NUMEROUS OTHERS?

II. WHETHER MASSACHUSETTS GENERAL LAW C. 272 § 29A RUNS AFOUL OF FIRST AMENDMENT OVERBREADTH DOCTRINE AS IT RELATES TO THE RESPONDENT?

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## STATEMENT OF THE CASE

On January 9, 1985, the respondent, Mr. Douglas Oakes, was indicted by a Worcester County Grand Jury and charged with posing a person under eighteen years of age for pornographic purposes in violation of Massachusetts General Law c. 272 §§ 29a, 31. Joint Appendix, p. 3a (hereinafter, "J.A. (page)").

On March 21, 1985, Mr. Oakes filed with Worcester Superior Court, a Request to Report the issue of the constitutionality of the statute, to the Appeals Court of Massachusetts pursuant to Rule 24 of the Massachusetts Rules of Criminal Procedure. J.A. 6a. The respondent also filed a Motion to Dismiss the indictment on the grounds that the statute violated the Massachusetts and United States Constitutions. J.A. 4a. On July 16, 1985 the Superior Court denied the Motion to Dismiss and the Request for Report. J.A. 1a.

On October 10, 1985 Mr. Oakes was tried before a jury and found guilty. The following facts were presented to the jury:

The respondent, Mr. Douglas Oakes, is the step-father of the complainant, Miss Laurie Supernor. In 1983, Miss Supernor, at age fourteen, decided to pursue a modeling career. In that same year, she enrolled in LaFemmina Modeling School, J.A. 19a, and thereafter entered several beauty pageants. J.A. 38a-39a. Miss Supernor had pictures taken of her at the modeling school. J.A. 27a. She also modeled at home where Mr. Oakes took photos of his daughter for the purpose of assembling a modeling portfolio. J.A. 27a. Mrs. Oakes would also take pictures of her daughter on occasion. J.A. 40a.

This case centers around ten photographs purportedly taken by Mr. Oakes in 1984. The photos show Miss Supernor, then fourteen, sitting with her breasts partially exposed. J.A. 21a-22a, 26a-27a. These select photos which were introduced at trial do not display any private parts of the subject's lower body. The photos do not and were not argued by the Commonwealth to depict the subject engaged in any sexually explicit conduct or sexually suggestive act. All ten photos show the subject in the same attire with her breasts partially covered. J.A. 22a.

On October 11, 1985 Mr. Oakes was sentenced to serve a term of imprisonment of ten years at Massachusetts Correctional Institute at Concord.

Both the evidence adduced at trial and the jury instructions given by the trial judge make clear that the respondent was convicted under the first proscribed offense —exhibiting a person under 18 years of age in a state of nudity. J.A. 10a-13a. The record is devoid of any evidence suggesting the minor was depicted or was engaged in sexually explicit conduct.

Further, even though the state of nudity which the subject was in was limited to the partial exposure of her breasts, the jury brought back a conviction after being instructed that nudity included the "uncovered post pubertal human female breast".

On November 7, 1985 a Notice of Appeal was timely filed to the Appeals Court of the Commonwealth of Massachusetts. This appeal was subsequently transferred, sua sponte, to the Supreme Judicial Court of Massachusetts.



On February 3, 1987 the case was argued before the Full Court of the Supreme Judicial Court. On February 1, 1988 the Supreme Judicial Court reversed Mr. Oakes' conviction and dismissed the indictment holding that Massachusetts General Law c. 272 § 29A was unconstitutionally overbroad.

—o—

## SUMMARY OF THE ARGUMENT

### I

First Amendment rights are fundamental and thus a challenge is appropriate when an overbroad statute abridges said rights. Among these fundamental rights is freedom of speech. The nature of these rights gives rise to the doctrine of overbreadth which gives an individual standing to challenge statutes that abridge First Amendment rights even if the individual's rights are not directly affected. This doctrine arises because of the propensity of an overbroad statute to chill protected behavior merely because of a fear of prosecution. Overbreadth doctrine staunchly protects First Amendment rights. (pages 6-9).

The statute in question proscribes both conduct and pure speech. The statute proscribes traditionally protected forms of expression; the taking, developing and dissemination of photographs. The application of overbreadth doctrine is appropriate in the instant case because the protected speech cannot be divorced from conduct. (pages 9-11).

The overbreadth of Massachusetts General Law c. 272 § 29A is substantial and was properly invalidated by the

Massachusetts Supreme Judicial Court. A statute is overbroad when on its face and in fact, a substantial number of instances exist where the statute infringes protected rights. In the instant case, a substantial number of these instances indeed exist. The statute proscribes behavior that is clearly protected like a parent photographing a naked child romping on the beach. Thus, the statute was properly invalidated as overbroad. (pages 11-17).

II

The statute in question is unconstitutional as it relates to respondent. Under this Court's decision in *Ferber,* nudity not involving sexual conduct, even if children are involved retains First Amendment protection. The pictures which led to respondent's conviction are devoid of any act or pose, that can even remotely resemble sexual conduct. The respondent's conviction is a quintessential illustration of "the hand of the censors becoming unduly heavy". *New York v. Ferber,* 458 U.S. 747, 756 (1982). The statute in question, as is evidenced in the present case, is unconstitutionally overbroad because it absolutely proscribes conduct and speech which has heretofore been recognized as protected expression under the First Amendment. (pages 17-22).

———o———



## ARGUMENT

### I. MASSACHUSETTS GENERAL LAW c. 272 § 29A IS PROPERLY DEEMED INVALID ON ITS FACE BECAUSE ITS SWEEPING PROHIBITION AGAINST NUDITY PER SE PERMITS COUNTLESS IMPERMISSIBLE APPLICATIONS TO THE PROTECTED CONSTITUTIONAL ACTIVITIES OF NUMEROUS OTHERS.

#### A. An Overbroad Statute Is Appropriately Challenged When First Amendment Rights Are Abridged.

First Amendment rights are fundamental and thus a challenge is appropriate when an overbroad statute abridges those rights. As this Court states, " the right to exercise the liberties safeguarded by the First Amendment 'lies at the foundation of free government by free men' and we must in all cases 'weigh the circumstances and appraise * * * the reasons * * * in support of [those] rights.' " *Marsh v. State of Alabama,* 326 U.S. 501, 509 (1946) quoting *Schnieder v. State,* 308 U.S. 147, 161 (1939).

Among these fundamental and closely protected rights is that of freedom of speech. "The freedom of speech . . ., which [is] secured by the First Amendment against abridgment by the United States, [is] among the fundamental personal rights and liberties which are secured to all persons by the Fourteenth Amendment against abridgment by a state." *Thornhill v. State of Alabama,* 310 U.S. 88, 95 (1940); see *Chaplinsky v. State of New Hampshire,* 315 U.S. 568, 570 (1942). This Court's words in a case in which the petitioner was convicted by a state court for attempting to incite insurrection reflect this tenet,

"[t]he power of a state to abridge freedom of speech . . . is the exception rather than the rule and the penalizing even of utterances of a defined character must find its justification in a reasonable apprehension of danger to organized government." *Herndon v. Lowry,* 301 U.S. 242, 258 (1937).

The nature of these freedoms gives rise to the doctrine of overbreadth which staunchly guards these fundamental rights. The doctrine carves out "an exception to the rule that individuals generally may not litigate the rights of third parties." L. Tribe, American Constitutional Law §§ 12-27 at 1023 (1988). "[A] litigant whose own activities are unprotected may nevertheless challenge a statute by showing that it substantially abridges the First Amendment rights of other parties not before the court." *Village of Schaumberg v. Citizens for a Better Environment,* 444 U.S. 620, 634; reh. den. 445 U.S. 972 (1980). See *City of Lakewood v. Plain Dealer Publishing Co.,* 108 S.Ct. 2138, 2143 (1988). Even in instances where a statute could be applied against an individual, this Court states that:

> The Court has repeatedly held that such a statute may be challenged on its face even though a more narrowly drawn statute would be valid as applied to the party in the case before it. This exception from the general rule is predicated on 'a judicial prediction or assumption that the statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression.'" *Members of City Council v. Taxpayers for Vincent,* 466 U.S. 789, 798-799 (1984) quoting *Broadrick v. Oklahoma,* 413 U.S. 601, 612 (1973).

It is indeed the general rule rather than the exception in cases involving these intrinsic rights that a party has



standing to challenge a statute even if the individual's rights are not directly abridged by an overbroad statute.

This overbreadth doctrine has evolved because "the very existence of some statutes may cause persons not before the Court to refrain from engaging in constitutionally protected speech or expression." *Young v. American Mini Theatres, Inc.,* 427 U.S. 50, 60; reh. den. 429 U.S. 873 (1976). "[T]he transcendent value to all society of constitutionally protected expression is deemed to justify allowing 'attacks on overly broad statutes with no requirement that the person making the attack demonstrate that his own conduct could not be regulated by a statute drawn with the requisite narrow specificity.'" *Gooding v. Wilson,* 405 U.S. 518, 521 (1972) quoting *Baggett v. Bullitt,* 377 U.S. 360, 366 (1964). A challenge is allowed in order to insure that free speech is not chilled by an overbroad law. An overbroad statute could prevent individuals from engaging in constitutionally protected speech merely because of fear of prosecution. *Secretary of State of Maryland v. Joseph H. Munson Co.,* 467 U.S. 947, 957 (1984). As Justice Marshall stated, an overbroad statute "hangs over [individuals] heads like a sword of Damocles." *Arnett v. Kennedy,* 416 U.S. 134, 231 (Marshall dissenting); reh. den. 417 U.S. 977 (1974). See L. Tribe, American Constitutional Law, §§ 12-27, p. 1023 (1988). First Amendment rights are staunchly protected to insure that individuals are not inhibited from employing these constitutionally protected rights.

**B. Massachusetts General Law c. 272 § 29A Attempts To Limit The Fundamental Right Of Free Speech.**

The statute in question proscribes both conduct and pure speech. The statute prohibits, in relevant part, any person from hiring, coercing, soliciting, employing, procuring, using, causing, encouraging or knowingly permitting a person under eighteen years of age to pose or be exhibited in a state of nudity for purposes of representation or reproduction in a book, magazine, pamphlet, motion picture film, photograph or picture. Massachusetts General Law c. 272 § 29A.

The statute proscribes not only conduct, the physical taking of pictures, but also the development and dissemination of said pictures in "traditional forms of expression such as books and films." *New York v. Ferber,* 458 U.S. 747, 771 (1982). See also, e.g. *Lerman v. Flynt Distributing Co., Inc.,* 745 F.2d 123 (2nd Cir. 1984); cert. den. 471 U.S. 1054 (1975) (magazine pictures as speech); *Erznoznick v. City of Jacksonville,* 422 U.S. 205 (1975) (motion pictures as speech). As the Massachusetts Supreme Judicial Court stated in its opinion below:

> Photography is a form of expression which is entitled to First Amendment protection just as the written or spoken word is protected. Photography as a means of communication and expression can be strikingly informative, as in the works of Mathew Brady and Margaret Bourke-White. It can be inspirationally expressive, as Ansel Adams demonstrated. Although not every picture may be worth a thousand words, in a First Amendment sense a picture is worth at least one. *Commonwealth v. Oakes,* 401 Mass. 602, 604 (1988).



Speech cannot be divorced from conduct in situations like the present:

> To base first amendment [sic] rights entirely on a speech-nonspeech distinction semantically avoids confronting the issue of what expression we will protect under the first amendment [sic] and what we will not. 'A constitutional distinction between speech and nonspeech has no content. A constitutional distinction between speech and conduct is specious. Speech *is* conduct, and actions speak.' *Griffin v. State of Florida,* 396 So.2d 152, 158 (Fla. 1981) (Sundberg, C.J. concurring specially and dissenting in part) quoting Henkin, *The Supreme Court, 1967 Term—Forward: On Drawing Lines,* 82 Harv. L. Rev. 63, 79 (1968) (emphasis in the original). See *State v. Helgoth,* 691 S.W.2d 281, 287 (Mo. 1985) (Welliver, J. dissenting); Note, *Protection of Children from Use in Pornography: Toward Constitutional and Enforceable Legislation,* 12 U.Mich.L.J.Ref. 295, 309 (1975) ("Because child pornography production and distribution involves visual material, legislation regulating such material must be considered with due regard for first amendment [sic] freedoms.") See also Note, *Child Pornography: A New Role for The Obscenity Doctrine,* 1978 U.ILL. L.F. 711, 743 n. 156.

Finally this court has employed overbreadth analysis on several occasions when both speech and conduct are present. See *Broadrick* at 601 (banning political activities by civil service employees); *Tinker v. Des Moines Independent Community School District,* 393 U.S. 503 (1968) (the wearing of black armbands). In a situation most analagous to the instant case, this Court held that a New York statute prohibiting persons from knowingly promoting sexual performances by a minor by distributing material which depicted these performances should be invali-

dated if the statute was substantially overbroad. "As we intimated in *Broadrick,* the requirement of substantial overbreadth extended 'at the very least' to cases involving conduct plus speech." *Ferber* at 771. Thus even in instances where, like the present, speech and conduct are mixed, an overbroad statute is encompassed by the protection of the First Amendment and overbreadth analysis.

### C. Massachusetts General Law c. 272 § 29A Is Substantially Overbroad And Was Properly Invalidated By The Massachusetts Supreme Judicial Court.

The overbreadth of Massachusetts General Law c. 272 § 29A is substantial and was properly invalidated by the Massachusetts Supreme Judicial Court. As previously stated, Massachusetts General Law c. 272 § 29A prohibits, *inter alia,* any person from hiring, coercing, soliciting, employing, procuring, using, causing, encouraging or knowingly permitting a person under eighteen years of age to pose or be exhibited in a state of nudity for purposes of representation or reproduction in a book, magazine, pamphlet, motion picture film, photograph or picture.

Further, Massachusetts General Law c. 272 § 31 defines nudity as:

> uncovered or less than opaquely covered post-pubertal human genitals, pubic areas, the post-pubertal human female breast below a point immediately above the top of the areola, or the covered male genitals in a discernibly turgid state. For the purposes of this definition a female breast is considered uncovered if the nipple or areola only are covered. In the case of pre-pubertal persons nudity shall mean uncovered or less than opaquely covered pre-pubertal human genitals or pubic area.



These two statutory provisions permit many impermissible applications that compromise First Amendment speech and thus M.G.L. c. 272 § 29A was properly invalidated.

In instances like the present where both speech and conduct are intertwined "the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep." *Broadrick* at 615. As this Court most recently stated, "[t]o succeed in [a] challenge, [an individual] must demonstrate from the text of the Law and from actual fact that a substantial number of instances exist in which the Law cannot be applied constitutionally." *New York State Club Association, Inc. v. City of New York,* 108 S.Ct. 2225, 2234 (1988). See *Members of the City Council of the City of Los Angeles v. Taxpayers for Vincent,* 466 U.S. 789, 800 (1984); *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.,* 455 U.S. 489, 494; reh. den. 456 U.S. 950 (1982). Further, in instances like the present, "[c]riminal statutes must be scrutinized with particular care." *City of Huston, Texas v. Hill,* 107 S.Ct. 2502, 2508 (1987). Thus, petitioner's contention that, in fact, this statute has not been applied unconstitutionally has no bearing on the statute's overbreadth and constitutionality. The actual application of the statute need not be considered because the statute's chilling effect may have deterred individual's constitutionally protected activities and thus, the statute's true effect would not be reflected by the records of prosecution pursuant to it. The unconstitutional effect of a statute can indeed be real without even one unconstitutional prosecution under it. The chilling effect as shown

on the statute's face is the factor that must be considered when determining overbreadth.[1]

In the instant case, both the "text of the Law" and "actual fact" indeed demonstrate that "a substantial number of instances exist in which the Law cannot be applied constitutionally." See *New York State Club Association, Inc.* at 2234. Even when, as in this case, the interests of minors are involved, the breadth of a statute must still be limited. "While children do not have first amendment rights co-extensive with adults, there are limits to government's ability to restrict the freedom of speech on the ground of protecting minors." *Upper Midwest Booksellers Association v. City of Minneapolis,* 602 F.Supp. 1361, 1366 (Minnesota, 1985). See *State v. Frink,* 653 P.2d 553, 555 (Oregon, 1982) ("Although a state may, consistent with the First Amendment, impose stricter controls over materials made available to minors than on those available to adults, not all nudity may be proscribed.")

In the instant case the statute in question is overbroad. The statute fais to be properly limited. The statute "criminalizes conduct that virtually every person would regard as lawful. Section 29A, for example, makes a criminal of a parent who takes a frontal view picture of his or her naked one-year-old running on a beach or romping in a wading pool." *Commonwealth v. Oakes,* 401 Mass. at 605. See *Erznoznik* at 212 (Statute overbroad where ordinance "might prohibit newsreel scenes or the opening

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1. Respondent submits that petitioner's use of an appendix listing information regarding prosecutions pursuant to c. 272 § 29A is improper and introduces information outside the record of the instant case.



of an art exhibit as well as shots of bathers on a beach.") See also *American Book-Sellers Association, Inc. v. Hudnut,* 771 F.2d 323, 332 (7th Cir. 1985); aff. 475 U.S. 1001; reh. den. 475 U.S. 1132 (1986) (Indianapolis statute "left out of its definition any reference to literary, artistic, political, or scientific value.") Further, pursuant to the statute in question, the mother who proudly stands by and watches the father take a picture of the child on the beach is literally "permitting" this picture taking and is also committing a criminal act. The statute would also prohibit a police detective from taking a picture of a child murder victim lying naked on the floor. A child war victim, lying nude, shown in a newsreel would fall within the definition of nudity.

Furthermore, puberty is defined as that period of life at which one becomes functionally capable of reproduction. *Taber's Encyclopedia Medical Dictionary* (13th ed. 1977). Puberty may occur from the ages of nine to sixteen in girls. *Id.* Thus, for purposes of the statute, a girl might be in a post-pubertal stage anywhere between the ages of nine and seventeen. The statute would effectively prohibit a parent from taking a picture of a post-pubertal ten-year-old without a bathing suit top on at the beach. It would prevent the display of the post-pubertal female breast in a magazine or movie regardless of the context in which the picture was taken. A professional model under the age of 18 who models less than "opaquely covering" lingerie would be considered in a state of nudity. Clearly the context of any picture is of great importance and must be considered in light of the First Amendment. "The First Amendment protects works which, *taken as a whole,*

have serious literary, artistic, political, or scientific value, regardless of whether the government or a majority of the people approve of the ideas of these works." *Miller v. California,* 413 U.S. 15, 34; reh. den. 414 U.S. 881 (1973).

In addition, Massachusetts General Law c. 272 § 29A is unlike the New York statute in *Ferber,* where this Court found that the "arguably impermissible application of the statute amount[ed] to . . . a tiny fraction of the material within the statute's reach. *New York v. Ferber* at 773. The Massachusetts statute sweeps more broadly because it does not require that the nudity be obscene, nor sexually explicit, nor lewd. The Massachusetts legislature has recognized this fact. On July 27, 1988, the legislature enacted a new version of § 29A thereby eliminating the version under which this case was filed.[2] The current Massachusetts

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2. SECTION 29A. (a) Whoever, either with knowledge that a person is a child under eighteen years or while in possession of such facts that he should have reason to know that such person is a child under eighteen years of age, and with lascivious intent, hires, coerces, solicits or entices, employs, procures, uses, causes, encourages, or knowingly permits such child to pose or be exhibited in a state of nudity, for the purpose of representation or reproduction in any visual material, shall be punished by imprisonment in the state prison for a term of not less than ten nor more than twenty years, or by a fine of not less than ten thousand nor more than fifty thousand dollars, or by both such fine and imprisonment.

(b) Whoever, either with knowledge that a person is a child under eighteen years of age or while in possession of such facts that he should have reason to know that such person is a child under eighteen years of age, hires, coerces, solicits or entices, employs, procures, uses, causes, encourages, or knowingly permits such child to participate or en-

(Continued on following page)



statute now properly limits prohibited behavior to that carried out with "lascivious intent." Clearly, the statute now before this Court swept more broadly than the statute in *Ferber* and was overbroad without the proper limiting words now present in the new statute. As this Court states, [i]n every case the power to regulate must be so exercised as not, in attaining a permissible end, unduly to infringe the protected freedom." *Cantwell v. State of Connecticut,* 310 U.S. 296, 304 (1940). See *Gooding v. Wilson,* 405 U.S. 518, 522 (1972); *National Association for the Advancement of Colored People v. Button,* 371 U.S. 415, 433 (1963). See also *Schad v. Borough of Mount Ephraim,* 452 U.S. 61, 68 (1981); *Village of Schaumburg v. Citizens for a Better Environment,* 444 U.S. 620, 637

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(Continued from previous page)

gage in any act that depicts, describes, or represents sexual conduct for the purpose of representation or reproduction in any visual material, or to engage in any live performance involving sexual conduct shall be punished by imprisonment in the state prison for a term of not less than ten nor more than twenty years, or by a fine of not less than ten thousand nor more than fifty thousand dollars, or by both such fine and imprisonment.

(c) In a prosecution under this section, a minor shall be deemed incapable of consenting to any conduct of the defendant for which said defendant is being prosecuted.

(d) For the purposes of this section, the determination whether the person in any visual material prohibited hereunder is under eighteen years of age may be made by the personal testimony of such person, by the testimony of a person who produced, processed, published, printed or manufactured such visual material that the child therein was known to him to be under eighteen years of age, or by expert medical testimony as to the age of the person based upon the person's physical appearance, by inspection of the visual material, or by any other method authorized by any general or special law or by any applicable rule of evidence.

(1980); *Secretary of State of Maryland v. Joseph H. Munson Co., Inc.*, 467 U.S. 947, 967 (1984) ("Where, as here, a statute imposes a direct restriction on protected First Amendment activity, and where the defect in the statute is that the means chosen to accomplish the State's objectives are too imprecise, so that in all its applications the statute creates an unnecessary risk of chilling free speech, the statute is properly subject to facial attack.")

Finally, the statute in question is properly invalidated without the need for further state adjudication or refinement:

> We have fashioned this exception to the usual rules governing standing, . . . because of the ' . . . danger of tolerating, in the area of First Amendment freedoms, the existence of a penal statute susceptible of sweeping and improper application.' . . . If the rule were otherwise, the contours of regulation would have to be hammered out case by case—and tested only by those hardy enough to risk criminal prosecution to determine proper scope of regulation. *Dombrowski v. Pfister*, 380 U.S. 479, 486, 487 (1965) quoting *Button* at 433. See *City of Lakewood v. Plain Dealer Publishing Co.*, 108 S.Ct. 2138, 2143 (1988).

The exception carved out for instances when First Amendment rights are abridged is intended to prevent individuals from having to test the application of an overbroad law, thus no further determinations at the state level, which would force the risk of criminal prosecution, are necessary.

Respondent does not debate that the narrow purpose of Massachusetts General Law c. 272 § 29A, as considered by this Court, is legitimate. However, the statute as considered in its overbroad form has a chilling effect which



deters professional movie producers, photographers and many other innocent persons, including parents, from taking pictures containing a person under eighteen who is not completely clothed. These persons who have heretofore exercised their constitutionally protected rights run the risk of prosecution no matter how innocent or tasteful their activity. Because of this overbreadth, Massachusetts General Law c. 272 § 29A was properly deemed invalid.

## II. FIRST AMENDMENT OVERBREADTH IS AN APPROPRIATE REMEDY UNDER THE CIRCUMSTANCES OF THE PRESENT CASE.

Although the Massachusetts Supreme Judcial Court did not decide the issue in view of its determination of section I above, the statute is also unconstitutional as it relates to the respondent, Douglas Oakes.

Massachusetts General Law c. 272 § 29A impermissibly restricts respondent's constitutionally protected speech. Therefore, the application of First Amendment overbreadth doctrine by the Massachusetts Supreme Judicial Court is warranted and appropriate within the specific facts of the instant case.

As previously stated the statute is directed at traditional forms of First Amendment activity and expression. See, section I(B) above. Because of the "inherent dangers of undertaking to regulate any form of expression," *Miller* at 23, this Court has devised strict limits on what falls within the permissible scope of First Amendment regulation. While a statute may proscribe what has been deemed unprotected speech, see e.g. *Chaplinsky* at 568 (unprotected speech raises no constitutional question), the

restriction cannot be so broad that it substantially restricts speech that retains First Amendment protection. See *Village of Schaumburg* at 637. The respondent submits that Massachusetts General Law c. 272 § 29A, as it incorporates § 31, is unconstitutional because in regulating unprotected expression, it has made protected expression the subject of a criminal offense.

For several years the standards enunciated in *Miller* were used as guidance in determining the appropriate line dividing protected from unprotected expression. *Ferber* at 753. If material was deemed legally obscene under the *Miller* test it was considered unprotected expression and thus subject to state regulation.

In *Ferber* this Court extended the category of unprotected speech to include non-obscene material depicting sexual conduct by children. *Ferber* at 764. In *Ferber*, a bookstore proprietor was convicted for selling films depicting young boys masturbating under a New York statute which banned the distribution of non-obscene material depicting conduct by children. *Ferber* at 749.

This Court was careful to point out, however, that "laws directed at the dissemination of child pornography run the risk of suppressing protected expression by allowing the hand of the censor to become unduly heavy." *Ferber* at 756. This Court concluded:

> There are, of course, limits on the category of child pornography which, like obscenity, is unprotected by the First Amendment. As with all legislation in this sensitive area, the conduct to be prohibited must be adequately defined by applicable state law, as written or authoritatively construed. Here, the nature of



> the harm to be combated requires that the offense be limited to works that visually depict sexual conduct below a specified age . . . *Ferber* at 764.

Thus, under *Ferber*, nudity not involving sexual conduct, even if children are involved, retains First Amendment protection. Indeed, the test for child pornography assumes that sexual conduct is present. *Ferber* at 764. Conversely, it is clear that material cannot legally be found to contain child pornography if there is no sexual conduct present. See, Note, *Child Pornography and Unprotected Speech; Supreme Court, 1981 Term*, 96 Harv.L.Rev. 141, 149 (1982) (category of unprotected speech in *Ferber* is restricted to abusive and exploitative material or hard core child pornography.)

The limited holding in *Ferber* does not tie the hands of the state legislature from proscribing the depiction of children in the nude unless the children are involved in some grotesque sexually deviate behavior. The lewd exhibition of the genitals is considered to represent the kind of conduct which a state may permissibly proscribe by including this conduct in its definition of sexual conduct. *Ferber* at 765 quoting *Miller* at 25.

The pictures which led to the respondent's conviction are devoid of any act or pose that can even remotely resemble sexual conduct. The subject is not engaged in any sexually explicit act, nor is the subject's genital area exposed. The pictures are of a nonsexual non-obscene seminude nature. The pictures cannot be considered "pornographic" under *Ferber*, since they contain nothing more harmful or more serious than nudity *per se*. Indeed, the respondent's conviction is a quintessential illustration of

"the hand of the censor becoming unduly heavy." *Ferber* at 756.

By enacting Massachusetts General Law c. 272 § 29A, the Massachusetts Legislature exceeded the constitutionally permissible scope of state regulation. The statute effectively turned a photograph containing semi-nudity without more into evidence of a criminal act. While pictures of the semi-exposed female breast of a person under eighteen years of age may be distasteful to the legislature, the government may not censor what it subjectively finds offensive. See *Young* at 85-87; *Erznoznik* at 205. If the statute's purpose is to prevent child pornography, the Massachusetts Legislature could narrowly draft such a statute limited to, for example, lewd behavior as was done in the current version of the statute. Further, in Massachusetts dissemination of visual material of a child in a state of nudity or sexual conduct was prohibited by Massachusetts General Law c. 272 § 29B which read in part:

> Whoever disseminates any visual material that contains a representation or reproduction of any posture or exhibition in a state of nudity or of any act that depicts, describes, or represents sexual conduct participated or engaged in by a child who is under eighteen years of age, knowing the contents of such visual material or having sufficient facts in his possession to have knowledge of the contents thereof, or whoever has in his possession any such visual material knowing the contents or having sufficient facts in his possession to have knowledge of the contents thereof, with the intent to disseminate the same, shall be punished in the state prison for a term of not less than ten nor more than twenty years or by a fine of not less than ten thousand dollars nor more than fifty thousand dollars or three times the monetary value of any economic gain derived from said dissemination,



> whichever is greater, or by both such fine and imprisonment.

Thus, § 29B greatly limits an individual's attempt at child pornography and renders prohibition of child pornography under § 29A substantially repetitive.

Section 29A's proscription against semi-nudity *per se*, as is evidenced in the present case, is unconstitutionally overbroad because it absolutely proscribes conduct and speech which has heretofore been recognized as protected expression under the First Amendment.

Indeed, as Justice Wilkins of the Massachusetts Supreme Judicial Court stated, "[i]t criminalizes conduct that virtually every person would regard as lawful. Section 29A, for example, makes a criminal of a parent who takes a frontal view picture of his or her naked one-year-old running on the beach or romping in a wading pool." *Commonwealth v. Oakes*, 401 Mass. 602, 605 (1988).

## CONCLUSION

For the aforementioned reasons, the judgment of the Supreme Judicial Court should be upheld and affirmed.

Respectfully submitted,

RICHARD J. VITA*
2 Oliver Street
Boston, MA 02109
Tel: (617) 426-6566

*Counsel of Record

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No. 87-1651

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1988

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COMMONWEALTH OF MASSACHUSETTS,
*Petitioner,*

v.

DOUGLAS L. OAKES,
*Respondent.*

---

**On Writ of Certiorari to the Supreme Judicial Court of the Commonwealth of Massachusetts**

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## REPLY BRIEF FOR PETITIONER

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JAMES M. SHANNON *
Attorney General
Commonwealth of Massachusetts
One Ashburton Place, Room 2001
Boston, MA 02108
(617) 727-2200

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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The parties to this case agree that the *Broadrick-Ferber* requirement of "substantial" overbreadth properly governs.[1] In addition, respondent does not contest that the challenged statute describes a central core of criminally regulable conduct. Disagreement in this case centers on whether the challenged statute is overbroad in a way which is both "substantial" and "real",[2] and whether re-

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[1] *Broadrick v. Oklahoma*, 413 U.S. 601 (1973); *New York v. Ferber*, 458 U.S. 747 (1982). *See* Brief for Respondent at 6.

[2] *New York State Club Association v. City of New York*, 108 S.Ct. 2225, 2234-35 (1988); *City Council v. Taxpayers For Vincent*, 466 U.S. 789, 800-01 (1984).

spondent's conduct in taking the photographs which form the basis of his conviction was protected under the First Amendment.

1. Forceful arguments are made by *amici* Massachusetts Society for the Prevention of Cruelty to Children *et al.*, and Covenant House/National Center for Missing and Exploited Children, that the conduct proscribed by the statute,[3] even where the poses do not portray sexual acts, is always sexually exploitive (and hence not protected under the First Amendment, *see New York v. Ferber*, 458 U.S. 747). The considered conclusions of these social service agencies, which deal with sexually exploited children on a daily basis, are entitled to great weight. At the very least, they put the lie to the essential premise of respondent and his supporters that sexual exploitation and taking pictures of nude children are two entirely different subjects. The plain fact, which cannot be emphasized enough, is that taking pictures of nude children *is* sexual exploitation in most cases.

Respondent and his *amici* (hereinafter collectively referred to as "respondents") have argued that section 29A is fatally overbroad on the grounds that it threatens to deter parents from photographing their naked children, nudists from advertising their chosen lifestyle, and artists from producing legitimate art. In making such claims, however, respondents plainly had some burden of demonstrating that the "chilling" scenarios they postulate are not merely hypothetical, but real. This they have failed to do.

Respondents have failed to identify any case in which section 29A has been used to prosecute a parent for taking a family photograph of a young naked child. Similarly, no prosecution has been uncovered involving family photographs taken of older children as part of a nudist family lifestyle. Finally, no endangerment of artistic freedom has been demonstrated in the Common-

[3] Mass. Gen. Laws ch. 272, § 29A ("section 29A").



wealth of Massachusetts during the history of section 29A and its predecessor.[4]

There has been no prosecution, or threat of prosecution, for the scenarios envisioned by respondents for the simple reason that prosecution in such circumstances would be inconsistent with appropriate implementation of a statute which is aimed at the sexual exploitation of children through portrayals of sexual conduct or through coerced or manipulated nudity. *See* Brief for Petitioner at 24-29. The explicit existence of an affirmative defense for bona fide scientific, medical, educational or cultural purposes, a defense which itself could be judicially interpreted to meet constitutional objections on a case-by-case basis, further undermines the respondents' claim that the hypotheticals they propose present a "substantial" and "real" threat to expression.

[4] The Appendix to *amicus* Law and Humanities Institute's ("LHI") Brief includes numerous films, photographs, and books that have been or are presently displayed in the Commonwealth or were produced or published here, and artists who apparently reside and create here. If anything, these examples demonstrate the absence, not the presence, of a chilling effect.

In addition, history does not support LHI's claim that the Commonwealth "departed radically" from the "legislative pattern established for child pornography laws by the United States Congress and the other states" when it enacted section 29A. (Brief of LHI at 27-28). This argument assumes that the Commonwealth enacted section 29A *after* Congress enacted federal child pornography legislation. In fact, however, the predecessor to section 29A, Mass. Gen. Laws ch. 149, § 104A, was enacted by Mass. Acts of 1977, c. 917, on January 3, 1978, *before* Congress enacted Pub. L. 95-225, § 2(a), 92 Stat. 7 (current version at 18 U.S.C. § 2251 (Supp. 1984)) on February 6, 1978. More importantly, the legislative history of the federal legislation reveals that Congress was concerned in 1978, prior to this Court's 1982 decision in *Ferber*, that the proposed bill might unconstitutionally prohibit the *sale* and *distribution*, *not* the *production*, of "non-obscene" material depicting children. S. Rep. No. 95-438, 95th Cong., 2d Sess. 1978, *reprinted* in 1978 U.S. Code Cong. & Admin. News 40, 49-50.

The likelihood of any future deterrence of protected expression is further diminished by the enactment of a successor statute which makes the legislative intent to criminalize only the sexual exploitation of children unmistakably clear. *See* Mass. Acts of 1988, c. 226 (striking section 29A and replacing it with a new section 29A entitled "Sexual Exploitation of Children"). The new statute requires proof of lascivious intent in its prohibition of child nudity. For this reason, the chilling effect alleged by respondents because of the original statute's hypothetical applicability to non-exploitive conduct is not a serious future consideration. *Cf. Pope v. Illinois*, 107 S.Ct. 1918, 1921 (1987) ("Facial invalidation of the repealed statute would not serve the purpose of preventing future prosecutions under a constitutionally defective standard.").

2. The suggestion (Brief of LHI at 23 n.2), that respondent's taking of the photographs for which he was convicted was well-intentioned, benign conduct falling within a protected zone of expression, is disingenuous at best. Defendant repeatedly testified under oath that he did not take the photographs. (Tr. 57-61). Moreover, the jury was specifically instructed that producing the photographs for an educational or cultural purpose for a bona fide school, museum or library, was a defense. (Tr. 104). Thus, the jury's verdict precludes any contention that the photographs were produced in order to further the victim's participation in modeling school.

On the clear facts of this case respondent was convicted and sentenced [5] for sexual exploitation, not for

[5] Respondent was sentenced to serve ten years at MCI Concord. An inmate sentenced to ten years at MCI Concord is eligible for parole after twelve months if he has no prior adult sentence, and after eighteen months otherwise. *See* Mass. Parole Board Policy 202 (1988). The Parole Board policies and regulations have the force of law. Mass. Gen. Laws ch. 27, § 5.



protected expression. *See* Brief for Petitioner at 31-33. As the trial judge put it:

> To suggest that a 15 year old girl can logically and intellectually submit herself for that kind of photography by her stepfather is to me—is to me an insult to anybody's intelligence. . . . [T]hey more than anybody else, are vulnerable to the exploitation of people like Douglas Oakes, and he was well aware of that, and he exploited that young woman. And I have no doubt that he'd exploit anybody else that he thought he could victimize in that context.

(Tr. 122).

Respectfully submitted,

JAMES M. SHANNON *
Attorney General
Commonwealth of Massachusetts
One Ashburton Place, Room 2001
Boston, MA 02108
(617) 727-2200

* Counsel of Record

(6)

No. 87-1651

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OCTOBER TERM, 1988

COMMONWEALTH OF MASSACHUSETTS,
PETITIONER,

*v.*

DOUGLAS OAKES,
RESPONDENT.

ON WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT FOR THE COMMONWEALTH OF MASSACHUSETTS

## Brief of the District Attorney for the Middle District of the Commonwealth of Massachusetts as *Amicus Curiae*

JOHN J. CONTE,
District Attorney for
the Middle District,
DANIEL F. TOOMEY,
First Assistant District Attorney for
the Middle District,
Courthouse, Room 220,
2 Main Street,
Worcester, Massachusetts 01608.
(508) 755-8601

*Of Counsel*:
CLAUDIA R. SULLIVAN,
Assistant District Attorney for
the Middle District

July, 1988

BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS

26 pp

## Questions Presented.

I. Whether Massachusetts General Laws c. 272, § 29A effects a limitation on nonexpressive activity thereby rendering erroneous the Supreme Judicial Court's application of First Amendment standards which are pertinent only to limitations upon expressive activity.

II. Whether, assuming *arguendo*, that M.G.L. c. 272, § 29A does occasion a limitation on expressive conduct, the Supreme Judicial Court erred in failing correctly to measure that limitation against the "sufficiently important governmental interest" justification recognized by the United States Supreme Court.

III. Whether the Supreme Judicial Court erred in relying upon an hypothetical instance of overbreadth without assessing the implausibility of the hypothesis or the *de minimus* nature of its impact in relation to the substantial effects of the legitimate reach of M.G.L. c. 272, § 29A.

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No. 87-1651

# In the
# Supreme Court of the United States

OCTOBER TERM, 1988

COMMONWEALTH OF MASSACHUSETTS,
PETITIONER,

*v.*

DOUGLAS OAKES,
RESPONDENT.

ON WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT
FOR THE COMMONWEALTH OF MASSACHUSETTS

## Brief of the District Attorney for the Middle District of the Commonwealth of Massachusetts as *Amicus Curiae*

## Judgment Below.

The judgment of the Supreme Judicial Court for the Commonwealth of Massachusetts, concerning which the petition for writ of certiorari was granted, is reported in *Commonwealth* v. *Oakes*, 401 Mass. 602, 518 N.E.2d 836 (1988).

## Jurisdiction.

The judgment of the Supreme Judicial Court for the Commonwealth of Massachusetts was entered on February 1, 1988. The jurisdiction of the United States Supreme Court has been invoked by petitioner under 28 U.S.C. § 1257(3) (1982).

## Pertinent Constitutional and Statutory Provisions.

United States Constitution, First Amendment:

> Congress shall make no law . . . abridging the freedom of speech or of the press . . . .

United States Constitution, Fourteenth Amendment:

> [N]or shall any state deprive any person of life, liberty, or property, without due process of law . . . .

Massachusetts General Laws c. 272, § 29A:

> Whoever with knowledge that a person is a child under eighteen years of age, or whoever while in possession or such facts that he should have reason to know that such person is a child under eighteen years of age, hires, coerces, solicits or entices, employs, procures, uses, causes, encourages, or knowingly permits such child to pose or be exhibited in a state of nudity or to participate or engage in any act that depicts, describes or represents sexual conduct for purpose of visual representation or reproduction in any book, magazine, pamphlet, motion picture film, photograph, or picture shall be punished by imprisonment in the state prison for a term of not less than ten nor more than twenty years, or by a fine of not



> less than ten thousand dollars nor more than fifty thousand dollars, or by both such fine and imprisonment.
>
> It shall be a defense in any prosecution pursuant to this section that such visual representation or reproduction of any posture or exhibition in a state of nudity was produced, processed, published, printed or manufactured for a bona fide scientific or medical purpose, or for an educational or cultural purpose for a bona fide school, museum or library.

Massachusetts General Laws c. 272, § 31:

> As used in section . . . twenty-nine A . . . the following words shall, unless the context requires otherwise, have the following meanings:—
>
> . . . . . .
>
> "Nudity", uncovered or less than opaquely covered post-pubertal human genitals, pubic areas, the post-pubertal human female breast below a point immediately above the top of the areola, or the covered male genitals in a discernibly turgid state. For purposes of this definition a female breast is considered uncovered if the nipple or the nipple or areola only are covered. In the case of pre-pubertal persons nudity shall mean uncovered or less than opaquely covered pre-pubertal human genitals or pubic area.

## Statement of Interest.

This brief, *Amicus Curiae*, is offered by the District Attorney for the Middle District of the Commonwealth of Massachusetts. As the senior elected law enforcement official for the Middle

District, a political subdivision of the Commonwealth, and as the public official responsible for the prosecution of the very indictment upon which the instant matter is grounded, the District Attorney is appropriately positioned to serve this Court as *Amicus Curiae*. Sup. Ct. R. 36.4.

## Summary of the Argument.

I

The objective of M.G.L. c. 272, § 29A is the eradication of that form of child abuse which involves the production of pornographic depictions of minors. In pursuit of that goal, the statute focuses exclusively upon the manufacturing, as distinct from the distribution, of child pornography. The conduct it condemns is wholly nonexpressive in character. Hence, the protections afforded by the First Amendment are not implicated, and the Supreme Judicial Court's invocation of those protections is reversible error. *Arcara* v. *Cloud Books, Inc.*, 478 U.S. 697, 106 S.Ct. 3172, 3178 (1986).

II

Assuming, *arguendo*, that M.G.L. c. 272, § 29A does effect a restriction upon expressive activity, that restriction is justified by a "sufficiently important governmental interest," *United States* v. *O'Brien*, 391 U.S. 367, 376-377 (1968), to wit, the protection of children. That protection is accomplished by criminalizing the conduct of those who would abuse children through the medium of the production of child pornography. Because the four-part standard of *O'Brien* is satisfied by § 29A, the statute's incidental, *de minimus* limitation upon expressive conduct is not violative of the First Amendment. The Supreme Judicial Court erred in finding such a violation on the face of § 29A.



III

The history of Massachusetts' invocation of M.G.L. c. 272, § 29A reveals no prosecution thereunder for the non-lascivious photographing of a minor in a state of nudity. All § 29A prosecutions have been in connection with sexually assaultive behavior or in circumstances other than those which troubled the Supreme Judicial Court. Hence, that Court's concern with respect to the hypothetical overbreadth of § 29A — *viz*, its potential application to "family album" photographs — has no grounding in reality. Additionally, even if it be assumed that the reach of § 29A exceeds its legitimate goal and trespasses into the "family album" territory in a manner uncontemplated by its drafters and protected by the First Amendment, the invasion is not "substantial . . . [when] judged in relation to the statute's plainly legitimate sweep." *Broadrick* v. *Oklahoma*, 413 U.S. 601, 615 (1973). Accordingly, given that insubstantiality, the Supreme Judicial Court erred in declaring § 29A unconstitutional on its face by reason of overbreadth.

## Argument.

### Introduction.

Having determined M.G.L. c. 272, § 29A to be in conflict with the First Amendment to the United States Constitution, the Supreme Judicial Court for the Commonwealth of Massachusetts declared the statute to be unconstitutional and reversed Respondent's conviction thereunder. *Commonwealth* v. *Oakes*, 401 Mass. 602, 518 N.E.2d 836 (1988). Petitioner, by means of the instant writ of *certiorari*, has sought review of the Supreme Judicial Court's declaration and a reinstatement of the conviction. *Amicus* concurs with Petitioner's view that

the Supreme Judicial Court's analysis and conclusion are flawed and urges, for the following three reasons, that its judgment be reversed.

## I. Because M.G.L. c. 272, § 29A Criminalizes Only Non-expressive Conduct, the Supreme Judicial Court Erred in Measuring the Statute by First Amendment Standards and by Concluding that the Statute Was, on Its Face, Violative of Those Standards.

The foundation upon which the Supreme Judicial Court has based its conclusion that M.G.L. c. 272, § 29A, is "unconstitutionally overbroad," *Oakes*, 518 N.E.2d at 837, is that Court's assumption that the statute impacts conduct which is expressive in nature. *Id.* at 837. Acknowledging that the conduct addressed by § 29A was the "permitting" of the victim to pose or to be exhibited while nude, *id.* at 837, the Court reasoned that the subsequent conduct of "taking her picture" was so inextricably interwoven with the "permitting" phase that the expressive quality of the "taking her picture" was necessarily also present in the "permitting". *Id.* In sum, the Supreme Judicial Court has theorized that the expressive attributes of "taking her picture" flow back and into the "permitting" conduct condemned by § 29A thereby requiring that the "permitting" be tested, as is any expressive activity, by First Amendment analysis.

The flaws in the Supreme Judicial Court's reasoning lie in its characterization of "taking her picture" as expressive conduct and in its related determination that such a labelling may color the assessment of the distinct act of "permitting". First, *Amicus* suggests that the mere fact of depressing the camera's shutter button, thus exposing the film inside, does not constitute



expressive conduct. Surely, the concept of expression, the *sine qua non* of First Amendment protection, involves more than the physical act of shutter button depression, a preparatory act remote from any expressive activity. *Paris Adult Theatre I* v. *Slaton*, 413 U.S. 49 (1973), teaches that the "communication of ideas" is that with which the First Amendment is concerned and it is that communicative attribute which enables conduct properly to be characterized as expressive. *Id.* at 67. The triggering of a shutter is not, without more, the communication of an idea and where, as at bar, there is no suggestion that communication is involved, there is no occasion to label the instant conduct — "taking of her picture" — expressive and meriting of First Amendment scrutiny.[1]

Second, the Supreme Judicial Court's willingness to credit the spillover theory, *Oakes*, 518 N.E.2d at 837, is similarly unsound. The Court reasoned that the "permitting" component of defendant's conduct "cannot fairly be isolated . . . from the expressive process of taking her picture". *Id.* Even were we to assume, *arguendo*, that the "taking her picture" component is expressive, there is no logic to the Court's perception of a blending of the "permitting" and the "taking her picture" segments such that the expressive attributes of the latter necessarily leach into the former.

The Massachusetts Legislature, by enacting M.G.L. c. 272, § 29A, voiced its concern that the undeniable harm occasioned

[1] Note that the Supreme Judicial Court found that "no commercial or even non-commercial distribution [of the photographs] was intended or occurred." *Oakes*, 518 N.E.2d at 837. The inference that the "taking her picture" was expressive conduct is thus all the more specious. Furthermore, the Supreme Judicial Court's implicit assumption that triggering the shutter constitutes an expression or communication loses further force when one reflects upon the absurdity that, had there been no film in the camera, Respondent's conduct would nevertheless, in the Court's view, still be expressive and entitled to First Amendment shielding from prosecution notwithstanding the impossibility of communication in those circumstances. The mere snapping of a shutter is not expressive conduct warranting First Amendment inquiry.

by child pornography, *see generally New York* v. *Ferber*, 458 U.S. 747, 756-764 (1982), is best remedied by a discrete governmental assault upon the very roots of the nefarious industry, *viz*, those who incept the process by inveigling minors to pose. The statute reflects the Legislature's awareness that the inducement, whether by compulsion or by friendly persuasion, is an evil separate and distinct from the vice of distribution. *Compare* M.G.L. c. 272, § 29A (criminalizing the preparation) *with* M.G.L. c. 272, § 29B (criminalizing the distribution). Production is at a distance, chronologically and functionally, from dissemination, and the communicative properties of the distribution stage do not, as the Supreme Judicial Court would have it, inevitably gestate in the inducement phase. Thus, *Amicus* disputes *Oakes*' thesis that "permitting" a minor to pose nude "cannot fairly be isolated . . . from the expressive process of taking her picture." *Oakes*, 518 N.E.2d at 837. *Amicus* urges this Court to recognize the disjunction of the two aspects, as has the Massachusetts Legislature, and to reject the notion that whatever expressive qualities reside in the "taking" phase necessarily seep into the "permitting" phase.

Because the "taking" phase is not expressive or, if it is expressive, that aspect of its character is not perforce integral to the "permitting" phase, § 29A's prohibition of the "permitting" conduct presents no threat to expression protected by the First Amendment. There being no expressive activity within the regulatory reach of § 29A, there is no occasion to test the statute to determine its compliance with the First Amendment. *Arcara* v. *Cloud Books, Inc.*, 478 U.S. 697, 106 S.Ct. 3172, 3177-78 (1986). The Supreme Judicial Court erred in subjecting § 29A to First Amendment measurement and in reversing Respondent's conviction as a consequence of that measurement. *Amicus* urges this Court to remedy that error.



## II. Assuming *Arguendo*, That the Conduct Criminalized by M.G.L. c. 272, § 29A, Is Expressive, A "Sufficiently Important Governmental Interest" Justifies the Incidental Restriction Effected by the Statute.

Should this Court accept, contrary to the contentions offered in Argument I, *supra*, the proposition that the statutory bar to "permitting" a minor to pose in a state of nudity impacts upon expressive conduct, the limitation of which must be exposed to First Amendment analysis, *Amicus* submits that the end of that analysis will be a determination favoring the constitutionality of M.G.L. c. 272, § 29A. The assumption, *arguendo*, that § 29A occasions a restriction upon expressive activity does not foreshadow the conclusion that the First Amendment has therefore been abridged. Indeed, given the circumstances of the challenged statute, its objective, and its reach, application of pertinent First Amendment standards demonstrates that § 29A is wholly compatible with constitutional demands. We proceed to that application.

*United States* v. *O'Brien*, 391 U.S. 367 (1968), addressed the instance of a restrictive statute brought to bear upon conduct claimed to be expressive and thus entitled to First Amendment protection:

> [E]ven on the assumption that the alleged communicative element in O'Brien's conduct is sufficient to bring into play the First Amendment, it does not necessarily follow that [the conduct] . . . is constitutionally protected activity. This Court has held that when "speech" and "nonspeech" elements are combined in the same course of conduct, a *sufficiently important governmental interest* in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms.

*Id.* at 376. (emphasis added). If, then, we take § 29A, and its preclusions with respect to "permitting" minors to pose in a state of nudity, to be a limitation upon expressive activity, the task set by *O'Brien* is to determine whether a "sufficiently important governmental interest" justifies the limitation.

*O'Brien* acknowledged that the quoted litmus was somewhat imprecise; to attempt to define with particularity the quantum of governmental interest which might provide the justification was to proceed upon a path leading only to ambiguity. *Id.* at 376-377. Nevertheless, in an effort to provide guidance to the legislators who draft limitations and the judges who assess their constitutionality, *O'Brien* observed that

> we think it clear that a government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

*Id.* at 377. When that four-limbed *O'Brien* test is laid against the statute at bar, the result, *Amicus* suggests, will be a recognition that the incidental limitations on expression occasioned by § 29A's assault on socially offensive conduct are indeed justified by a "sufficiently important governmental interest". *Id.* at 376. We move, then, to the *O'Brien* test.

First, that the Commonwealth may constitutionally establish a statutory scheme which, by criminalizing child pornography, protects its youth from abuse should not now be subject to serious challenge. *New York* v. *Ferber*, 458 U.S. 747, 754-758 (1982), has put to rest any suggestion that the First Amendment



constitutes a wall over which a child pornography preclusion may not prevail. Writing for the Court, Mr. Justice White noted that "the States are entitled to greater leeway in the regulation of pornographic depictions of children. . . . Accordingly, we have sustained legislation aimed at protecting the physical and emotional well-being of youth even when the laws have operated in the sensitive area of constitutionally protected rights." *Id.* at 756-757. Continuing, he observed that

> The prevention of sexual exploitation and abuse of children constitutes a government objective of surpassing importance. . . . The legislative judgment, as well as the judgment found in the relevant literature, is that the use of children as subjects of pornographic materials is harmful to the physiological, emotional, and mental health of the child. *The judgment we think, easily passes muster under the First Amendment.*

*Id.* at 757-758 (footnotes omitted) (emphasis added). *Amicus* submits that the power of the Commonwealth to craft laws, consistent with constitutional demands, aimed at eradicating child pornography and its analog, child abuse, is beyond dispute.

Second, the regulation of expressive activity effected by § 29A "furthers an important or substantial governmental interest . . .." *O'Brien*, 391 U.S. at 377. Certainly, there is no more important or substantial governmental interest than the protection of the physical, mental, and emotional well-being of children. The Commonwealth's protective obligation is seriously compromised when sexual exploitation and abuse — the necessary corollaries to child pornography, *Ferber*, 458 U.S. at 759 n.10 — are not repelled with maximum constitutional

vigor. This Court has characterized the government's prophylactic duty as of "surpassing importance." *Id.* at 757. Accordingly, *O'Brien*'s demand that the governmental interest advanced by the regulation be "important or substantial," *O'Brien*, 391 U.S. at 377, is patently satisfied by § 29A's suppression of child pornography and its offspring, child abuse.

Third, the Commonwealth's concern for the integrity, both physical and mental, of its youth is a "governmental interest . . . unrelated to the suppression of free expression . . . ." *Id.* While the imagination might conjure an extreme hypothetical instance wherein the preclusion of free speech was a result, albeit unintended and remote, of the Commonwealth's attempts to protect its children by punishing those who would suffer them to pose in the nude, those instances are, most assuredly, rare to a point approaching the chimerical[2] and are of *de minimus* concern when viewed in relation to the enormously salutary effects of the reduction in child abuse occasioned by § 29A. *Cf. Ferber*, 458 U.S. at 763-764 (observing that when "the evil to be restricted so overwhelmingly outweighs expressive interests," the First Amendment's shields are not available to protect those interests). Thus, the anti-abuse objectives of § 29A are indeed "unrelated" to any residual suppression of speech.

Fourth, the occasional burdening of expression by operation of § 29A "is no greater than is essential to the furtherance of [the child abuse reduction objective of the statute]." *O'Brien*, 391 U.S. at 377. There is no suggestion, on this record or otherwise, that § 29A has been, or is likely to be, applied to expressive activities other than those which by chance attend

[2] See Argument III, *infra*, wherein appears reference to the extraordinary infrequency of § 29A prosecutions unaccompanied by companion accusations involving sexually assaultive conduct. The message to be drawn therefrom is that, in application as well as intent, § 29A is not ordered toward suppression of expression.



the conduct § 29A was designed to eliminate. And, there is likewise no suggestion that § 29A has, as its primary focus, the suppression of expression. *See generally Stromberg* v. *California*, 283 U.S. 359 (1931) (statute aimed at restricting expression cannot be rescued by reason of its incidental impact upon the noncommunicative conduct which was the vehicle for the expression). In sum, *Amicus* submits that whatever effect § 29A may have upon expression — assuming *arguendo*, that it has *any* such effect — is wholly fortuitous and is decidedly secondary to its finely focused impact upon nonexpressive conduct. The statute's restriction upon communication is no greater than that which is minimally necessary to accomplish its fundamental objective of deterring the production of child pornography.

The *O'Brien* requirements are met by § 29A. If, as the Supreme Judicial Court has assumed, *Oakes*, 518 N.E.2d at 837, the speech and nonspeech aspects of Respondent's conduct are wedded such that § 29A's purposeful restriction of the latter necessarily, albeit inadvertently, restricts the former, then, *Amicus* contends, the statute will nevertheless survive First Amendment inquiry upon a showing of the presence of "a sufficiently important governmental interest in regulating the nonspeech element. . . ." *O'Brien*, 391 U.S. at 376. The Supreme Judicial Court found no such interests because the circumstances of the taking of the instant photographs were not, in that Court's view, sufficiently offensive to "warrant overriding First Amendment freedoms . . . ." *Oakes*, 518 N.E.2d at 837. With all due deference to the Supreme Judicial Court, *Amicus* suggests that the appropriate constitutional inquiry demands an examination focused not on the character of Respondent's conduct, as *Oakes* indulged, *id.*, but, rather, on the governmental interest served by the statute's restriction of expression, as *O'Brien* requires. *O'Brien*, 391 U.S. at 376. The fulcrum question is not the offensiveness, *vel non*, of the

criminal conduct, but the importance of the Commonwealth's interest in making the conduct criminal. Employing that focus, *Amicus* concludes that the First Amendment is not violated by the implementation of § 29A and urges that the Supreme Judicial Court's judgment to the contrary be reversed.

## III. Assuming *Arguendo*, That M.G.L. c. 272, § 29A Occasions a Limitation on Expressive Activity, That Limitation Is Insubstantial When Viewed in Relation to the Statute's Legitimate Applications and, Accordingly, the Statute Is Not Unconstitutionally Overbroad.

An overbreadth analysis need not be indulged should this Court accept the contention, offered in Argument I, *supra*, that the conduct condemned by M.G.L. c. 272, § 29A, is nonexpressive and thus not entitled to First Amendment protection. *New York* v. *Ferber*, 458 U.S. 747, 767-768 (1982); *Broadrick* v. *Oklahoma*, 413 U.S. 601, 610-612 (1973); *Commonwealth* v. *Oakes*, 518 N.E.2d at 838-839 (O'Connor, J, dissenting). However, assuming, *arguendo*, that § 29A is viewed by this Court as reaching expressive activity, an overbreadth assessment is appropriate. Proceeding upon that assumption, we next engage the overbreadth inquiry.

The Supreme Judicial Court has determined § 29A to be overbroad because "[i]t criminalizes conduct that virtually every person would regard as lawful." *Commonwealth* v. *Oakes*, 518 N.E.2d at 838 (1988).[3] Applying the *Broadrick* test,[4] the

[3] As the sole example of such inappropriately criminalized conduct, the Court hypothesized that § 29A might reach "a parent who takes a frontal view picture of his or her naked one-year-old running on a beach or romping in a wading pool." *Oakes*, 518 N.E.2d at 838.

[4] *Broadrick*, 413 U.S. at 615.



Massachusetts Court opined that the overbreadth of § 29A was "real" and "substantial." *Id*. *Amicus* disputes that characterization and suggests that the speculative overbreadth, if any, of the statute at bar is *de minimus*, not warranting the facial invalidation of § 29A effected by *Oakes*.

Overbreadth — the doctrine which permits an accused to challenge a statute on account of its asserted unconstitutionality with respect to persons situated in circumstances distinct from the accused's — is itself an exception to the general rule that

> a person to whom a statute may constitutionally be applied will not be heard to challenge that statute on the ground that it may conceivably be applied unconstitutionally to others, in other situations not before the Court.

*Broadrick*, 413 U.S. at 610. The exception is based on the proposition that one, incidentally touched by a statute restrictive of free speech, may be discouraged from expression and, not having been prosecuted, can never vindicate his or her free speech rights. For that reason, the overbreadth doctrine permits the accused, who is prosecuted under the statute, to assert vicariously the violation of First Amendment entitlements experienced by hypothetical third parties. *Id*. at 612. Clearly then, the overbreadth doctrine is itself a deviation from the ordinary course of constitutional analysis and ought not to be indulged without a reason of surpassing merit.[5]

[5] Indeed, *Broadrick* underscored the disfavored character of the overbreadth argument by noting that

> Application of the overbreadth doctrine in this manner is, manifestly, strong medicine. It has been employed by the Court sparingly and only as a last resort. Facial overbreadth has not been

No such merit appears at bar. The statute alleged to be overbroad is a criminal law claimed by defendant to be potentially inhibitory of others' rights of expression. This Court has not been warmly receptive to the overbreadth allegation brought in analogous contexts. *See, e.g., Cantwell* v. *Connecticut*, 310 U.S. 296 (1940) (breach of peace proscription not condemned because it might be unconstitutionally applied to others, but because defendant's conduct did not fit the proscription). *Broadrick* recognized the judicial reluctance to employ the overbreadth rule to criminal statutes:

> Equally important, overbreadth claims, if entertained at all, have been curtailed when invoked against *ordinary criminal laws* that are sought to be applied to protected conduct.

*Broadrick*, 413 U.S. at 613 (emphasis added). A like reluctance should obtain at bar.

Similarly, where the impact upon speech occasioned by the conduct-regulating statute does not involve partisan concerns or have the effect of purging a discrete, identifiable course of thought or communication, this Court's vigilance against overbreadth is exercised with markedly less rigor than would be employed if the peripheral restriction were impacting on advocacy or on a particular, principled proposition. *Cf. Keyishian* v. *Board of Regents*, 385 U.S. 589 (1967). *Broadrick* describes the judicial hesitancy so:

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> invoked when a limiting construction has been or could be placed on the challenged statute.

*Broadrick*, 413 U.S. at 613 (citations omitted). This Court's sentiment has been decidedly contrary to all but the most limited invocations of the overbreadth principle.



> Additionally, overbreadth scrutiny has generally been somewhat less rigid in the context of statutes regulating conduct in the shadow of the First Amendment, but doing so in a neutral, noncensorial manner.

*Broadrick*, 413 U.S. at 614-615 (citations omitted). *Amicus* submits that § 29A satisfies the *Broadrick* criteria for "less rigid" overbreadth examination, *id.* at 614, because it is most "even-handed" in application. *See id.* at 616. The statute is not "directed at particular groups or viewpoints" and is, therefore, "non-censorial." *Id.* It seeks to regulate conduct without discrimination between classifications of acts or objectives and is, therefore, "neutral." *Id.* When viewed through the prism of the "less exacting overbreadth scrutiny" to which it is entitled by reason of its "neutral, non-censorial" character, *id.* at 614, § 29A is seen to bear none of the stigmata of unconstitutional overbreadth.

In this ambience of judicial reluctance to find unconstitutional overbreadth, we turn to an examination of the Supreme Judicial Court's determination that § 29A is impermissibly overbroad. *Oakes*, 518 N.E.2d at 837-838. *Broadrick* instructs that that examination is to be undertaken with a realization that

> [F]acial overbreadth adjudication is an exception to our traditional rules of practice and that its function, a limited one at the outset, attenuates as the otherwise unprotected behavior that it forbids the State to sanction moves from "pure speech" towards conduct and that conduct — even if expressive — falls within the scope of otherwise valid criminal laws that reflect legitimate state interests in maintaining comprehensive controls over harmful, constitutionally unprotected conduct.

*Broadrick*, 413 U.S. at 615. But, to recognize that the constitutional imprimatur depends upon the point, on a scale bounded at one end by "pure speech" and at the other by "conduct," at which the statute under scrutiny is placed is not to end the inquiry. There must also be an assessment as to whether or not the placement of the statute at that particular point on the scale intrudes unacceptably upon the values sought to be protected by the First Amendment. *Broadrick* provides guidance upon that question too:

> Although such laws, if too broadly worded, may deter protected speech to some unknown extent, there comes a point where that effect — at best a prediction — cannot, with confidence, justify invalidating a statute on its face and so prohibiting a State from enforcing the statute against conduct that is admittedly within its power to proscribe.

*Id.* In sum, a statute directed to conduct will not be ruled overbroad — that is, unacceptably intruding upon peripheral expressive activity nominally entitled to First Amendment shielding — unless the intrusion is "not only real, but substantial as well, judged in relation to the statute's plainly legitimate sweep." *Id.* This Court's task, then, is to determine whether the intrusion claimed at bar is both real and substantial. *Amicus* submits that the instant intrusion is neither.

That the intrusion is neither real nor substantial is patent. The Supreme Judicial Court viewed as a "substantial" intrusion the hypothesis that § 29A reaches the "parent who takes a frontal view picture of his or her naked one-year-old running on a beach or romping in a wading pool." *Oakes*, 518 N.E.2d at 838. There is, however, nothing, beyond that mere assertion in the Court's opinion, which evidences the substantiality of



§ 29A's alleged overbreadth. Indeed, the history of the implementation of § 29A in the Commonwealth constitutes an eloquent refutation of both the *Oakes* suggestion that parental photography is commonly prosecuted and the consequent *Oakes* inference that the overbreadth of § 29A is "real and substantial." *Id.*[6]

It is simply not realistic, based upon the Massachusetts experience reflected in the Appendix to Petitioner's Brief, to maintain that § 29A is likely to be employed to suppress expression. And, even should we assume, *arguendo*, that an incidental diminution of expression may trickle from the invocation of § 29A against nonexpressive conduct, that seepage can hardly be said to rise to the level of "substantial" required

[6]The poverty of the Supreme Judicial Court's conclusion is demonstrated by the reality that family album-style photographs have never been the subject of § 29A prosecutions and that, with few exceptions, § 29A has been invoked only as a companion charge to accusations involving sexually assaultive behavior. See Appendix to Petitioner's Brief wherein are listed all § 29A prosecutions during the past few years. The exceptions to the general rule — *viz*, that § 29A prosecutions are pursued only where incident to charges of sexual assault — are of no value to the proponents of overbreadth because each exception presents a circumstance wholly distinct from the family album hypothesis which concerned the Supreme Judicial Court. The exceptions, as designated in Petitioner's Appendix, are:

> Defendant "4" — § 29A charge was companion to an indictment for dissemination of child pornography.
>
> Defendant "23" — § 29A charge arose out of incidents in which school teacher took photographs of naked teenagers without their knowledge and from behind a one-way mirror as they performed exercises he had earlier directed.
>
> Defendant "8" — No information available as to the circumstances of the § 29A offense.

*Amicus* submits that the record of § 29A prosecutions depicts a statute nearly always applied to conduct incident to sexual assault and, in those non-assaultive instances, to conduct so bizarre and anti-social as to fall outside the "family album" concerns which were central to the Supreme Judicial Court's conclusion of overbreadth.

by *Broadrick*, 413 U.S. at 615. Furthermore, when "judged in relation to the statute's plainly legitimate sweep," *id.*, any occasional impact by § 29A upon expression is dwarfed by the urgent need for the remedies provided by § 29A to combat the malignancy of child sexual abuse. *See generally New York* v. *Ferber*, 458 U.S. 747, 756-764 (1982). The "legitimate sweep" of § 29A enfolds the production of child pornography and, if any expressive activity is inhibited by either the actuality or the potentiality of a § 29A prosecution of nonexpressive conduct in implementation of that "legitimate sweep," then such inhibition will be of little consequence when assessed in the context of the vital contributions made by § 29A to society's effort to mend a most unsightly tear in its fabric.[7]

*Amicus* concludes that M.G.L. c. 272, § 29A is not unconstitutionally overbroad. The overbreadth determination by the Supreme Judicial Court, *Oakes*, 518 N.E.2d at 837-838, did not take into account a host of constitutional verities, *viz*, overbreadth is a doctrine of "last resort," a limited exception to the general rule disfavoring vicarious assertion of constitutional rights, a principle "curtailed" when asserted against criminal laws, and a precept of minimal worth when invoked against a "neutral, non-censorial" restriction of expression on the periphery of the First Amendment. *See Broadrick*, 413 U.S. 610-616. Additionally, the Supreme Judicial Court's assumption that § 29A works a "real . . . [and] substantial" trespass upon protected expression, *Oakes*, 518 N.E.2d at 837-838, is

[7] The infrequency and insubstantiality of the inhibition has been acknowledged by this Court:

> Yet we seriously doubt, and it has not been suggested, that these arguably impermissible applications of the statute [to medical textbooks and National Geographic pictorials] amount to more than a tiny fraction of the materials within the statute's reach.

*New York* v. *Ferber*, 458 U.S. at 773.



unsupported either in fact or in theory. That Court's overbreadth determination was error, and its condemnation of § 29A ought not to prevail.

## Conclusion.

For the reasons aforestated, *Amicus* urges that the constitutionality of M.G.L. c. 272, § 29A be confirmed and that the Supreme Judicial Court's judgment in *Commonwealth* v. *Oakes*, 401 Mass. 602, 518 N.E.2d 836 (1988), be reversed.

Respectfully submitted,

JOHN J. CONTE,
District Attorney for
the Middle District,
DANIEL F. TOOMEY,
First Assistant District Attorney for
the Middle District,
Courthouse, Room 220,
2 Main Street,
Worcester, Massachusetts 01608.
(508) 755-8601

*Of Counsel*:

CLAUDIA R. SULLIVAN,
Assistant District Attorney for
the Middle District

July, 1988

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No. 87-1651

IN THE
# Supreme Court of the United States
OCTOBER TERM, 1988

COMMONWEALTH OF MASSACHUSETTS,
*Petitioner,*

v.

DOUGLAS OAKES,
*Respondent.*

**On Writ of Certiorari to the Supreme Judicial Court of Massachusetts**

## MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* AND BRIEF *AMICI CURIAE* IN SUPPORT OF PETITIONER

ELIZABETH K. SPAHN *
154 Stuart Street
Boston, MA 02116
(617) 451-0010
*Attorney for*
*Massachusetts Society for Prevention of Cruelty to Children*

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

IN THE

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---

**On Writ of Certiorari to the Supreme Judicial Court of Massachusetts**

---

## MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE*

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Massachusetts Society for the Prevention of Cruelty to Children (MSPCC) and 29 other organizations serving the needs of children respectfully move for leave to file the attached brief *amicus curiae* in support of the Commonwealth of Massachusetts in this case. The consent of the attorney for the Petitioner has been obtained. The consent of the attorney for the Respondent was requested but no response was received.

All 30 *amici* are non-profit private organizations dedicated to protecting and serving the needs of children of all races and religions. 26 of these groups are based in Massachusetts, in many cases providing direct medi-

cal and psychological treatment, shelter, counselling and support services to children who are the victims of child pornography and child sexual abuse. Two *amici* provide services to children in other states (New York and Alaska). Two *amici*, the Child Welfare League of America, and the American Humane Association, are major national organizations providing leadership throughout the 50 states in protecting children from abuse and neglect. A complete list and brief description of each organization are found in the attached Appendix.

All 30 organizations are concerned that the invalidation of the Massachusetts child pornography statute has left children unprotected from even the most vicious child pornography. Because of their unique perspectives as direct service providers treating children victimized by pornography, their families, as well as perpetrators of child sexual abuse, *amici* respectfully seek this Court's leave to file the attached brief.

Respectfully submitted,

ELIZABETH K. SPAHN *
154 Stuart Street
Boston, MA 02116
(617) 451-0010
*Attorney for*
*Massachusetts Society for*
*Prevention of Cruelty*
*to Children*

* Counsel of Record

## QUESTION PRESENTED

Whether the theoretical possibility that a criminal statute designed to prevent the sexual abuse and exploitation of children could be applied marginally to activity protected by the First Amendment justifies invalidation of the entire statute on overbreadth grounds and reversal of respondent's conviction without deciding whether the respondent's actions were within the statute's substantial legitimate reach.

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**On Writ of Certiorari to the Supreme Judicial Court of Massachusetts**

---

## BRIEF *AMICI CURIAE* IN SUPPORT OF PETITIONER

---

### STATEMENT OF INTEREST

The Massachusetts Society for the Prevention of Cruelty to Children and 29 other child protective service organizations are dedicated to the protection of children, and to serving children and their families, including perpetrators of child sexual abuse and pornography. *Amici* include two major national organizations and 26 direct service providers serving children at risk in Massachusetts. Two other *amici* provide services to children in other states (New York and Alaska). Several *amici* provide self-help or counselling and therapy services to child sexual abusers. Other *amici* specialize in the long term

residential treatment of victims of child sexual abuse who have themselves become sexual abusers of younger children. (See attached Appendix.)

*Amici* believe based on their clinical, first hand experience with children and based on scientific research, that child pornography is a significant form of child sexual abuse, and that the use of children in nude, sexually suggestive poses or engaged in sexual conduct plays a significant role in the cycle of child sexual abuse. Pornography is used to blackmail child victims into silence, and photos of past victims are used to seduce future victims into imitative behaviors. Taking sexual photographs of children causes serious long term emotional disturbances in many victims.

The facial invalidation of the Massachusetts child pornography statute has resulted in a number of pending prosecutions being dismissed and has left all the child victims without any legal protection. It has created the appearance of legal approval of sexual photography of children with potentially serious effects on children currently exploited. *Amici* are interested in the outcome of this case because of their direct involvement in assisting the victims of child pornography.

## SUMMARY OF ARGUMENT

The Massachusetts Supreme Judicial Court erred in three important respects in construing federal overbreadth doctrine. First, the court relied on a single imaginary hypothetical without considering whether the statute presented a realistic danger of chilling third parties' speech, and without considering whether any overbreadth would be incurable and taint all possible applications of the statute. Second, the court analyzed a child pornography statute as if it were political speech, when there is no danger of eroding core political speech because the statute contains an exception for educational, scientific,



medical and cultural materials. Third, the court erred in facially invalidating a statute without considering alternative narrowing constructions.

The lower court's primary First Amendment concern rested on a single imaginary hypothetical—nude frontal photographs of a one year old on a beach or romping in a wading pool. The federal constitution has never been interpreted to require perfect congruence between the statutory purposes and imaginary, hypothetical overbroad applications of the means. Only where a substantial amount of constitutionally protected conduct is within the sweep of the statute should it be stricken as facially overbroad. Substantial overbreadth has been interpreted to mean that the law could never be applied in a valid manner, or that it is so broad that it might inhibit the constitutionally protected speech of third parties. There must be some showing of a realistic danger of inhibiting third parties' speech. Unlike prior Supreme Court cases, there has been no showing in the case at bar that any pattern of prosecutorial overbreadth in application exists, nor is it likely that reasonable parents would be chilled in their ordinary photography of children by the mere existence of criminal child pornography statutes. (Pages 5-7.)

Any imaginary overbreadth is not incurable, nor would it taint all possible applications of the child pornography statute. The central core of activity included within this statute involves pedophilia, child sexual abuse and exploitation. Child pornography plays a central role in deviant sexual abuse of children by pedophiles. Scientific research since 1982 has shown that photography of children is substantially inseparable from sexual abuse of children, is associated with child prostitution, and it may be a significant factor in the development of later deviant behaviors. Application of the Massachusetts statute to hard core child pornography is not incurably tainted by the hypothetical overbreadth. (Pages 7-9.)

Distinguishing between the untainted hard core pornography and the hypothetical toddler romping at the beach can be accomplished by external, verifiable factual evidence surrounding the method of production of the photographs, the method of collecting and saving the photos, and the actual use of the photos to blackmail or instruct future child victims. (Pages 9-12.)

The lower court erred in treating a child pornography statute as if it were political speech protected at the highest levels of judicial scrutiny. The lower court seemed to believe that either the activity was "speech" and therefore any conceivable overbreadth required facial invalidation, or the activity was "conduct" and completely beyond the scope of the First Amendment. The correct federal constitutional standard for examining a statute addressing child pornography is to ensure that the permissible regulation does not erode protected speech. The Massachusetts statute contains an explicit exemption for educational, scientific, medical and cultural materials. (Pages 12-18.)

The lower court did not consider alternatives to facial invalidation. Two limiting constructions of the statute are possible if the hypothetical overbreadth is viewed as substantial. First, the Court could construe the prohibition on nudity as including only child nudity in a sexual context, relying on the externally verifiable evidence of the methods of production, saving, and use of the photographs. Second, the Court could limit the statute to protecting children from photographs of sexual conduct and post-pubescent nudity. (Pages 18-22.)

*Amici* urge the Court to consider the effect of facial invalidation on all the children of Massachusetts, who are currently without any protection from the hardest of hard core child pornography. (Pages 22-24.)



## ARGUMENT

### I. A Single, Imaginary Hypothetical Does Not, Under Federal Law, Justify The Facial Invalidation Of An Entire Statute In The Absence Of A "Realistic Danger" To Third Parties' Speech, Unless The Overbreadth Is Incurable And Would "Taint All Possible Applications" Of The Statute.

The Massachusetts Supreme Judicial Court erred in construing federal constitutional overbreadth doctrine. The Massachusetts court held that the child pornography statute was overbroad because:

> [i]t criminalizes conduct that virtually every person would regard as lawful. Section 29A, for example, makes a criminal of a parent who takes a frontal view picture of his or her naked one-year-old running on a beach or romping in a wading pool. Surely the First Amendment protects that kind of activity even if what the defendant did in this case could properly be criminalized (a matter we need not decide). *Commonwealth v. Oakes*, 401 Mass. 602, 605 (1988).

This statement represents the central point in the state court's reasoning in striking down the entire child pornography statute. Three short sentences purporting to apply federal overbreadth doctrine have left not only the Oakes child but every other child in the Commonwealth unprotected from child pornography.

The lower court misunderstood federal overbreadth doctrine, which does not require facial invalidation of an entire statute based on one single imaginary impermissible application. As Justice Brennan explained: "We have never held that a statute should be held invalid on its face merely because it is possible to conceive of a single impermissible application. . . ." *Broadrick v. Oklahoma*, 413 U.S. 601, 630 (1973) (Brennan, J., dissenting). To require a statute be so perfectly drawn that not one situation could be imagined which would render

the statute unconstitutional is to require a congruence between the state's legitimate purposes and the means enacted by statute surpassing even the strictest levels of judicial scrutiny under the Equal Protection Clause. Overbreadth doctrine in the First Amendment context does indeed protect our rights to self-expression with heightened judicial scrutiny. But only where a *substantial* amount of constitutionally protected conduct is within the sweep of the statute do the federal courts strike the entire statute as overbroad. *Houston v. Hill*, 482 U.S. ——, 107 S. Ct. 2502, 96 L.Ed.2d 398, 410 (1987).

There has been no showing of any overbreadth in application of the Massachusetts child pornography statute other than a single imaginary situation. For an overbreadth attack to prevail, the challenger must demonstrate substantial overbreadth. The Court has interpreted substantial as requiring that the law either "could never be applied in a valid manner" or that it is so broad that it "may inhibit the constitutionally protected speech of third parties." *New York State Club Association, Inc. v. City of New York*, 56 U.S. Law Week 4653, 4656 (1988). The Massachusetts child pornography statute clearly meets the first test, since there must be some valid applications against child pornography. See, e.g., *New York v. Ferber*, 458 U.S. 747 (1982). The second test is likewise met because the Court requires a showing that there must be a "realistic danger" of compromising First Amendment rights of parties not before the Court. *New York State Club Association, Inc. v. City of New York*, 56 U.S.L.W. at 4656. The present facts indicate no actual or threatened prosecutions of parents for innocent photos of their toddlers at the beach.

In *Houston v. Hill, supra*, the Court did find substantial overbreadth in an ordinance which prohibited intentional interference with police officers in the performance of their duties. The *Houston* ordinance had been repeatedly applied to a political activist, and evidence was introduced at trial which demonstrated a long pattern of 200 actual applications of the statute to conduct clearly protected by the First Amendment. *Houston v. Hill*, 96 L.Ed.2d at 408 n.4 and 409 n.5. The contrast between the *Hill* case and the case at bar could not be clearer. *Hill* involved repeated applications of the ordinance in ways which violated the First Amendment, and Hill himself was convicted by the state courts for speech which was protected. In the instant case, Massachusetts prosecutors have not been shown to be engaged in even one prosecution of parents photographing their infants romping at the beach. The Massachusetts child pornography statute is clearly directed to the production of sexually explicit photographs of children.



Unlike *Hill*, there is no demonstrable pattern which might chill the rights of third parties not before the Court. No realistic danger exists that typical family photos will result in criminal prosecutions and no reasonable parent is likely to be chilled in his or her speech.

The normal federal rule is that a statute should not be invalidated further than necessary to dispose of the case before it. *Brockett v. Spokane Arcades, Inc.*, 492 U.S. 492, 502 (1985). The Court observed that unless the identified overbreadth is "incurable" and would "taint all possible applications" of the statute, the normal rule that partial rather than facial invalidation is the required course. *Brockett v. Spokane Arcades, Inc., supra* at 2802.

Any hypothetical potential for overbroad application to parents photographing toddlers at the beach is not likely to taint all the other possible applications of the statute as required by *Brockett, supra.* The role of photography in child sexual abuse by pedophiles is of central importance. "Law-enforcement investigations have verified that pedophiles almost always collect child pornography or child erotica. *Collection* is the key word

here. It does not mean that pedophiles merely view the pornography: They save it. It comes to represent their most cherished sexual fantasies." Lanning, K., *Child Molesters: A Behavioral Analysis for Law-Enforcement Officers Investigating Cases of Child Sexual Exploitation*, National Center for Missing and Exploited Children and the Federal Bureau of Investigation at 17 (1987). Child pornography is used to blackmail children, to instruct future child victims and to condition children by lowering their inhibitions and resistance to sex.[1]

The Massachusetts child pornography statute is clearly directed to photographs of children in sexual contexts. The language of section 29A covers only nudity or sexual conduct, and contains an explicit exception for bona fide scientific, medical, educational or cultural purposes. Any imaginary application of the statute to nude photographs of pre-pubertal children in a non-sexual context is not incurable within the meaning of *Brockett, supra*. The question of whether a particular collection of photographs constitutes an impermissible sexual context is primarily a question of the factual circumstances surrounding the method of production, saving and actual use of particular photos. Any overbreadth in the actual application of

[1] Campagna and Poffenberger, *The Sexual Trafficking in Children*, Auburn House Publishing Co., 1988 at 116-118. See also Goldstein, *The Sexual Exploitation of Children*, Elsevier Science Publishing Co., 1987 at 123-129. "No single characteristic of pedophilia is more pervasive than the obsession with child pornography. . . . Each convicted child molester interviewed either collected or produced child pornography, or both. Most said they had used the material to lower the inhibitions of children or to coach them into posing for photographs." Sen. Comm. on Governmental Affairs, Perm. Sub. Comm. 99th Cong., 2d Sess., Rep. No. 99-537, Child Pornography and Pedophilia at pp. 9-12. "The greatest bulk of child pornography is produced by child abusers themselves in largely 'cottage industry' fashion and thus child pornography must be considered as substantially inseparable from the problem of sexual abuse of children." U.S. Dept. of Justice, Attorney General's Comm'n on Pornography, Final Report at 68.



the statute should, especially in the context of child sexual abuse, be dealt with on a case by case basis.

The definition of sexual or non-sexual context is, according to current law enforcement investigative practices, identifiable by several factors. FBI Agent Lanning has identified three factors which law enforcement investigators should examine in determining whether the photographs of children are indicative of pedophilia. In production of the photography, pedophiles are likely to use bribery, trickery or seduction. In saving the photographs, pedophiles generally have large numbers of photos all of children in the same age group. The material is generally concealed or hidden. The third factor is the use of the material to blackmail the child victim, and to instruct future child victims. Lanning, K., *supra* at 23-25.

Applying the three salient factors to the hypothetical case of a one-year old romping at the beach, it is clear that none of the aspects of impermissible sexual context would be present. First, the photos would be taken openly, not secretly. No threats to the child's physical well-being, no bribes of drugs, alcohol, money or fame would be needed for a straightforward photo of a romp at the beach. Second, the romp at the beach is most likely to be preserved in a family album together with other family photos of the child fully clothed, and such an album is more likely to be proudly displayed to any person showing the faintest interest than it is likely to be hidden away. Third, a normal family photo is not likely to be used to blackmail the victim by threats of showing it to his or her mother, teacher or friends. Nor is a family photo likely to be used in a sexual activity with other children.

Application of the three factors to the actual facts in the *Oakes* case presents a very different picture. First, the nude photos of the child were taken in secret, with-

out the knowledge of the mother or any other person. Tr. at 37; J.A. 34a. The child was photographed numerous times, nude, in inappropriate lingerie from Fredericks of Hollywood, and with her breasts exposed. Tr. at 24, 65-68; J.A. 21a, 34a-35a. The context in which the photos were taken was clearly sexual and the defendant Oakes told the child that he would take the photos of her as if they were for Playboy magazine. Tr. at 28; J.A. 25a. Second, the photos were kept secret, separate from other family photos of birthdays, Christmas and vacations. The pornographic photos were first kept by Mr. Oakes locked away in a safe. Tr. at 45; J.A. 43a. Later Mr. Oakes moved them to a secret location hidden in the false ceiling of the basement. Tr. at 36; J.A. 34a. Third, the coercive power of Mr. Oakes over the child was manifested when she ripped the photos up and threw them away in the woods. Mr. Oakes forced her to retrieve the pieces of the photos and restore them. Tr. at 27; J.A. 24a. The actual facts of the Oakes case present no innocent romp at the beach, but rather a secretive, coercive, sexually provocative exploitation of a minor child.

The difficulty of distinguishing between impermissible sexual child nudity and an innocent romp at the beach arises because a normal healthy interest in sex is not triggered by pre-pubertal children, nude or otherwise. If the law required a subjective evaluation based on the material's effect on the consumer, as in federal obscenity standards which focus on "appeal to the prurient interest", little of the pedophilia pornography could be reached. The Court in *New York v. Ferber*, 458 U.S. at 756-758, has already recognized that the states' interest in protecting children from pornographic exploitation is not limited to material which meets traditional federal obscenity standards. The central distinction is a shift in focus, away from the subjective assessment of the material's effect on the audience/consumer, and redirected



to the question of the material's effect on the real child involved in the production by examining verifiable facts relating to the production, saving and use of the photos. Thus purely written material involving fantasies of child sexual abuse are not prohibited (unless otherwise obscene under *Miller v. California*, 413 U.S. 15 (1973)). The harm occurs only when a living human child is involved in the produciton of sexual photographs.[2]

Massachusetts and other states must be free to protect our children from the exploitation of child pornography unless there is a realistic danger that our prosecutors, juries and appellate courts are misusing the permissible prohibition against child pornography pretextually to censor socially valuable political speech. The compelling nature of the states' interest in protecting children from sexual exploitation has been amply recognized by the Court.[3] The role of photography itself has been

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[2] *New York v. Ferber*, 458 U.S. at 757 n.9-11, addresses in depth numerous scientific studies prior to 1982 discussing the harm to children from being involved in the production of pornography. "Even if the photographs were never again seen, the very activity involved in creating the photograph is itself an act of sexual exploitation of children, and thus the issues related to the sexual abuse of children and those related to child pornography are inextricably linked." U.S. Dept. of Justice, Attorney General's Comm'n on Pornography, Final Report at 66.

[3] The scientific literature assessing the harm to children from participating in the production of pornography was analyzed in depth by the Court. *New York v. Ferber*, 458 U.S. at 758 n.9-11. *Amici* would like to call the Court's attention to additional scientific research since 1982 regarding the harm to children from participating in pornography. The interrelationship between child pornography and child prostitution was examined in depth by two nationally recognized experts. Davidson, H. and Loken, G., *Child Pornography and Prostitution*, National Center for Missing and Exploited Children, National Obscenity Enforcement Unit, U.S. Dept. of Justice (1987). Mr. Davidson, who is Director of the American Bar Association, National Legal Resource Center for Child Advocacy and Protection, found a significant relationship between child pornography and child prostitution at p. 3-4.

found to be a significant factor in the development of later deviant behaviors among children victimized by pornography.[4]

There has been no showing that any overbreadth in this case would be either incurable or would taint all possible applications of the statute. The only overbreadth addressed by the lower court involved an imaginary situation—toddlers at the beach. Facial invalidation of the entire statute is inappropriate under federal overbreadth standards where there is no pattern of prosecutorial misuse, where no realistic danger exists of chilling third parties' speech, and where the hypothetical overbreadth does not taint all possible applications of the child pornography statute.

**II. Analyzing A Child Pornography Statute As If It Constituted Political Speech, Where The Statute Itself Contains An Exception For Educational, Scientific, Medical Or Cultural Purposes, Constitutes Reversible Error In The Application Of Federal Constitutional Law.**

The second error in applying overbreadth doctrine to the *Oakes* case involves a misunderstanding of First Amendment analysis as developed by this Court under federal constitutional principles. The central danger of overly broad statutes which may chill or interfere with

[4] Burgess, Hartman, McCausland and Powers, *Response Patterns in Children and Adolescents Exploited Through Sex Rings and Pornography*, 141:5 Am. J. Psychiatry 656, 661 (May, 1984). The Burgess study evaluated 66 children who had been sexually exploited, assessing their later psychological and social adjustment. The study found that the most serious later behaviors, including documented repetition of the acts on younger children (such as vaginal insertion of objects and sodomizing or urinating on younger children) were significantly related to whether the child had been used in pornography photographs. "The data suggest that when children are used for pornography and are in the sex ring for more than a year the two variables appear to be strongly associated with the development of deviant and symptomatic behaviors."



the rights of third parties not before the Court arises from the vital importance of robust and vigorous debate in a democratic society. The classical example of a dangerously overbroad statute which would substantially interfere with third parties' free speech rights even though the particular defendant might constitutionally be reached is exemplified by a prior restraint statute operating in the context of political speech. Last Term, the Court in *Lakewood v. Plain Dealer Publishing Co.*, 56 U.S.L.W. 4611, 4613 (U.S. June 14, 1988), found a licensing ordinance vesting unbridled discretion in the Mayor over newspaper racks on city property dangerously overbroad. Several factors were stressed in the Court's opinion; the potential for a prior restraint, the potential for political pressure resulting from unfettered, standardless licensing power discretion in an elected official, and the central importance of protecting a free and robust press from potential censorship. Having framed the issue as one of prior restraint of political speech, the majority of the Court could not constitutionally tolerate even the potential of overbroad applications.

> [W]e have previously identified two major First Amendment risks associated with unbridled licensing schemes: self-censorship by speakers in order to avoid being denied a license to speak; and the difficulty of effectively detecting, reviewing, and correcting content-based censorship 'as applied' without standards by which to measure the licensor's action. It is when statutes threaten these risks to a significant degree that courts must entertain an immediate facial attack on the law. *Lakewood v. Plain Dealer Publishing Co.*, 56 U.S.L.W. at 4614 (Brennan, J.).

The dissenters in *Lakewood* were less concerned with the potential for future overbroad applications not because of any lack of sensitivity to the dangers of prior restraints and censorship. The dissenters, however, viewed the location of newsracks on city property as essentially separate from the central concerns of protecting

political speech. "Because the placement of newsracks on city propetry is not so protected (*as opposed to the circulation of newspapers as a general matter*), the exception to our usual facial challenge doctrine does not apply here." *Lakewood v. Plain Dealer Publishing Co., Inc.*, 56 U.S.L.W. at 4617 (White, J. dissenting) (emphasis added). "Because the Lakewood Ordinance does not directly regulate an activity protected by the First Amendment, we should instead take the traditional, as-applied approach to adjudication. . . ." *Lakewood v. Plain Dealer Publishing Co., Inc.*, 56 U.S.L.W. at 4621 (White, J. dissenting).

*Lakewood* thus turns on whether the issue is perceived as closely related to the protection of political speech, in which case the potential for overbroad application cannot be tolerated, or as unrelated (or peripherally related) to political speech in which case the normal processes of case-by-case adjudication should properly be employed. Apparently all members of the Court participating in the *Lakewood* case agreed that *if* the case involved hard core political speech, the mere potential for overbroad application would constitute a serious threat under the First Amendment.

At the other end of the spectrum, the Court has addressed the question of potentially overbroad applications of statutes regulating commercial speech as presenting a less serious threat under the First Amendment. In *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977), the Court observed that the normal justifications for overbreadth doctrine applied weakly, if at all, in the ordinary commercial speech context.

> [T]here are 'commonsense differences' between commercial speech and other varieties. [Since] advertising is linked to commercial well-being, it seems unlikely that such speech is particularly susceptible to being crushed by overbroad regulation. [Moreover], concerns for uncertainty in determining the scope of protection are reduced; the advertiser seeks to disseminate information about a product or service that he provides, and presumably he can determine more readily than others whether his speech is truthful and protected. *Bates v. Arizona*, 433 U.S. at 381.



This is not to suggest that commercial speech is outside the scope of First Amendment protection, nor that greater scope for governmental regulation of commercial speech should be permitted to erode protections for the core of political speech protected at the highest levels of judicial scrutiny. *Shapero v. Kentucky Bar Assoc.*, 56 U.S.L.W. 4532, 4536 (U.S. June 14, 1988). What is suggested is that the Court requires less perfect congruence in the context of commercial speech, while maintaining the highest levels of required congruence in the context of political speech. *Shapero v. Kentucky Bar Assoc.*, 56 U.S.L.W. at 4536-4537 (O'Connor, J. dissenting).

Distinguishing between political and commercial speech is not always difficult, as the Court found in *Meyer v. Grant*, 56 U.S.L.W. 4516 (U.S. June 7, 1988) (unanimously characterizing a prohibition against paid petition circulators as political speech). It merely seems that way because factually easier cases rarely require review by the highest Court. Despite the intricacies of occasional concurring and dissenting opinions, it is clear that there is substantial common ground among the members of the Court. Potential overbreadth cannot be tolerated under the First Amendment where the case involves the central core of political speech. Less perfect congruence is required, and potentially overbroad future applications are less of a threat, where the activity in clearly a purely commercial transaction. As Justice Stevens observed: "The question whether a specific act of communication is protected by the First Amendment always requires some consideration of both its content and its context." *New York v. Ferber*, 458 U.S. 747, 778, (1982) (Stevens, J. concurring).

The essential error in the lower court's opinion in *Oakes*, *supra*, arose because of a misunderstanding of the permissible scope of overbreadth doctrine in the context of a statute prohibiting child pornography. The opinion in *Oakes* treats the case as one involving political speech, relying on cases such as *United States v. O'Brien*, 391 U.S. 367 (1968) (involving a draft card burner) and *United States v. Albertini*, 472 U.S. 675 (1985) (involving political activity on federal military bases). The court seemed to view the issue as a question of deciding whether Oakes' activity fell within one or the other of two very rigid categories. *Commonwealth v. Oakes*, 401 Mass. 602, 604-605 (1988). Either the photographs constituted speech, in which case they were to be treated as political speech protected by the very highest levels of judicial scrutiny or the photographs were not speech at all, but rather "conduct", which would be entirely outside the protection of the First Amendment. Not surprisingly, having set up a rigid either/or speech/conduct dichotomy, the court found itself with no alternative but to strike down the entire statute based on potential, hypothetical future misapplications.

If viewed as political speech, it is not surprising that the Massachusetts court would find even a single hypothetical overbroad application dangerous to First Amendment freedoms. The central error is that child pornography cannot plausibly be claimed to constitute political speech, or even the lesser but still protected category of commercial speech. Child pornography, as the Court has unanimously recognized in *New York v. Ferber*, *supra*, is classified as a "category of material outside the protection of the First Amendment." *New York v. Ferber*, 458 U.S. at 763-764. The level of congruence between the state's purpose and the statutory means therefore is not required to be as perfect as if the activity involved political or even commercial speech.

The central issue in the context of speech which is characterized as child pornography is whether the statute



is drawn to preserve protection for socially valuable speech for educational, scientific, medical or cultural purposes. *New York v. Ferber*, 458 U.S. at 774-775 (O'Connor, J., concurring), and 776-777 (Brennan, J., concurring). The Court's central concern is ensuring that lower overbreadth standards for relatively low value speech such as child pornography not be used to chip away at the highest levels of protection accorded political and other socially important speech. The Massachusetts child pornography statute does in fact contain explicit statutory language clearly exempting material "for a bona fide scientific or medical purpose, or for an educational or cultural purpose for a bona fide school, museum or library." Mass. Gen. Laws ch. 272, sec. 29A. Any danger of this particular statute being applied in the future to socially valuable speech rising to the level of political speech appears to be minimal. Nor is there any claim that defendant Oakes' speech itself constituted socially valuable activity rising to the level of political or even commercial speech. His defense at trial consisted of denying he took the photographs. Tr. at 57-61.

This case does not present one of the difficult marginal fact situations where the speech in question can plausibly be construed as either political speech or child pornography. *Amici* do not request the Court to lower its vigilance in preserving our First Amendment freedoms in the context of socially valuable political speech. The Court has already established guidance for the lower courts in recognizing that the degree of overbreadth must be examined in the context of the social value of the speech, and that child pornography is "in its rightful place near the bottom of this hierarchy." *New York v. Ferber*, *supra* at 781 (Stevens, J., concurring).

The lower court erred in treating the child pornography statute as if it were political speech protected by the highest levels of judicially required congruence. There is no danger that the Massachusetts statute is or might be

in the future used to erode protections for socially valuable speech because the statute contains an explicit exemption for educational, cultural, medical and scientific materials. Where there is a very slight possibility of potentially overbroad future applications, it does not require invalidation of the entire statute on its face in the context of child pornography.

### III. Facial Invalidation Of A Child Pornography Statute Is Inappropriate Where Alternative Narrowing Constructions Could Cure Whatever Marginal Overbreadth Might Be Imagined.

The third error in the application of federal overbreadth doctrine in the case at bar occurs because the lower court struck down the entire child pornography statute on its face. No prosecutions against pedophiles can, at this point, proceed in Massachusetts. A limiting construction of the Massachusetts statute should have been employed by the state court. However, where the lower court has fallen into plain error by endorsing a broad reading of the statute, it has fallen afoul of the well-established principle that statutes will be interpreted to avoid constitutional difficulties. *Frisby v. Schultz*, 56 U.S.L.W. 4785, 4788 (U.S. June 27, 1988). This Court should construe the statute more narrowly to avoid striking the entire statute because of an imaginary overbroad application to pre-pubertal children in a non-sexual context.[5] In *Frisby, supra*, the Court narrowly construed an ordinance prohibiting residential picketing by interpreting the statute as prohibiting only picketing focused on a single residence and as not containing an exception for labor picketing despite the lower courts' broader reading. As Justice O'Connor observed, a lower court interpretation is not necessarily binding on the Supreme Court. "To the extent they endorsed a broad reading of the ordinance, the lower courts ran afoul of the well-established principle that statutes will be interpreted to avoid constitutional difficulties." *Frisby v. Schultz*, 56 U.S.L.W. at 4788. If the Court is willing to more narrowly construe a statute regulating political speech, as in *Frisby*, then surely a narrowing construction should be entertained as an alternative to facial invalidation in the child pornography context. In the case before us, the Court could more narrowly construe the pre-pubertal nudity provision as banning only photographs taken, saved or used in a sexual context if the Court deems the hypothetical situation as serious enough to constitute substantial overbreadth.

The facts of the actual case before the Court, however, do not even involve a pre-pubertal child. The *Oakes* case involves a thirteen year old, post-pubertal child who was tricked into displaying her body nude in a sexually provocative manner for the gratification of her stepfather. The portion of the Massachusetts child pornography statute which applies directly to the Oakes prosecution is found in Mass. Gen. Laws Ann. ch. 272, sec. 31 (West Supp. 1987), defining nudity in a post-pubertal child as displaying the genitals, pubic areas or the female child's breast below a point immediately above the top of the areola. Thus even if photographing a pre-pubertal child nude in a non-sexual context might hypothetically constitute an overbroad application of the statute, the actual application in *Oakes* involved a separate portion of the child pornography statute which protects adolescent children. It requires no extension of *New York v. Ferber, supra*, to find that photographs of a child's female breasts

[5] Nor should federalism concerns preclude a narrowing construction where a state court has misapplied federal overbreadth doctrine. "While the construction that a state court gives a state statute is not a matter subject to our review . . . this Court is the final arbiter of whether the Federal Constitution necessitated the invalidation of a state law. . . . [W]e may correct erroneous applications of the Constitution that err on the side of an overly broad reading of our doctrines and precedents as well as state-court decisions giving the Constitution too little shrift." *New York v. Ferber*, 458 U.S. at 767.

and genitals need not be obscene under *Miller v. California, supra*, standards. Post-pubescent child nudity need not be "portrayed in a patently offensive manner" involving lewd exhibition of the genitals. *New York v. Ferber*, 458 U.S. at 761, 764. While a normal family album might contain occasional photos of naked toddlers, it is most unlikely a family album would contain nude photos of adolescent children romping at the beach.

The Court could, if it deems potential overbroad applications substantial and presenting a realistic danger to free speech, construe the Massachusetts child pornography statute more narrowly on either (or both) of two theories. The Court could limit application to nude photography in a sexual context, requiring factual evidence regarding the production, saving and use of the particular photos in question. This construction has the advantage of support from the statutory language itself and focuses on the actual and compelling legislative purpose to prevent child sexual exploitation. It has the additional advantage of focusing the efforts of law enforcement officials, judges and juries on externally verifiable factual evidence rather than subjective assessments of the appeal or lack of appeal to the prurient interest. Or, the Court could construe the ban on nude photographs as limited to adolescent nudity, and limit application of the pre-pubertal protections to acts which represent sexual conduct. This construction would save three of the four measures in sec. 29A directed to protecting children. Adolescent sexual conduct, adolescent nudity, and prepubescent sexual conduct could still be protected. Only pre-adolescent nudity would present a danger of chilling third parties' free speech under this construction.

Where, as here, the statute itself contains a severability clause,[6] the statute should not be declared unconstitutional in its entirety "unless the invalid provisions are

[6] Mass. Gen. Laws Ann. ch. 604 sec. 8 amended the child pornography statutes to provide a severability clause in 1982.



unseverable and it cannot reasonably be believed that the legislature would have passed the one without the other, or unless the elimination of the invalid part would render the remainder of the act incapable of accomplishing the legislative purposes." *Brockett v. Spokane Arcades, Inc.*, 472 U.S. at 506 and 506 n. 15.[7] Even if the Massachusetts legislature is barred from protecting pre-pubertal children from nude pornography, the protection of prepubertal children from production of pornography depicting sexual conduct and the protection of adolescent children should be allowed.

The well established principle that statutes will be interpreted to avoid constitutional difficulties is fundamental to post-1937 federal constitutional law. Justice Brandeis' famous concurring opinion in *Ashwander v. TVA*, 297 U.S. 288, 346-348 (1936), sets forth the basic tenents of judicial power. Two of those factors are applicable in the instant case.

> [3.] The Court will not 'formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied.' [4.] The Court will not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of. This rule has found most varied application. Thus, if a case can be decided on either of two grounds, one involving a constitutional question, the other a question of statutory construction or general law, the Court will decide only the latter. *Ibid.*

The precise facts of the *Oakes* case do not require any present decision on the question of whether nude photo-

[7] Massachusetts caselaw also favors a narrowing construction where possible to save statutes. *Commonwealth v. Lammi*, 386 Mass. 299, 301 (1982); *Commonwealth v. O'Neil*, 233 Mass. 535, 540-541 (1919). Severability is also favored over facial invalidation. *Mayor of Boston v. Treasurer*, 384 Mass. 718 (1981).

graphs of pre-pubertal children in a non-sexual context violate the First Amendment, since *Oakes* involves a post-pubertal child in a sexual context. Whatever slight possibility exists for future overbroad applications can and should be cured short of facial invalidation of the statute by a narrowing construction.

The Massachusetts Society for Prevention of Cruelty to Children and the many other child protective service groups which have joined in this *amicus* brief urge the Court to consider the effect of facial invalidation on all the children of Massachusetts, as well as children in other states. *Amici* do not believe that there is any realistic danger of overbroad prosecutions of innocent parents photographing their toddlers, nor do *amici* believe that any reasonable parents would be chilled in customary photography of their children. The experience of the child protective agencies has not indicated that the elected officials vested with prosecutorial discretion in Massachusetts have engaged in a pattern of harassing innocent parents with prosecutions for child pornography. *Amici* urge the Court to uphold the Massachusetts child pornography statute on the grounds that any overbreadth is hypothetical, not substantial, and does not present any realistic danger to free speech.

*Amici* also urge the Court to consider the effect of facial invalidation on the Oakes child herself. This child believed strongly enough that her stepfather's actions were improper sexual exploitation to endure the pain and humiliation of publicity and testimony. Any adolescent child is normally embarrassed about his or her developing body. She has endured having her bodily developments repeatedly exposed in three contexts: for her stepfather's gratification, in courtroom testimony and in all the various publicity that has surrounded this case both locally and through defendant Oakes' appearances on a national television talk show. The niceties of overbreadth doctrine will in all likelihood not be understood by the



Oakes' child or other children subjected to sexual exploitation. *Amici* urge the Court to make it clear that the highest law of our civilization does not condone or ratify sexual photography of children.

For all these reasons, *amici* hope the Court will uphold the Massachusetts child pornography statute and defer any decision on non-sexual pre-pubertal photos until such a situation is actually presented, if ever. If the Court is unable to uphold the statute in its entirety because the Court believes a genuine danger to free speech exists, *amici* request that the Court narrow the construction of the statute to save whatever portions may be found constitutional. The importance of a saving construction lies at the heart of the concern for *amici* who provide protection, counselling and services to many troubled families. Some measure of legal protection establishing limits on the sexual exploitation of children is centrally important to all the children of Massachusetts. Facial invalidation leaves even the hardest-core child pornography victims without protection, while a narrowing construction could save at least some of these children.

The third alternative, referral to the state court on the issue of a narrowing construction or severability, is the least desirable result short of actual facial invalidation in the opinion of *amici*. It will continue to leave the children of Massachusetts unprotected from child pornography for the lengthy period of appellate review. Currently our children have been without legal protection since February 1, 1988, and extending that period by even one additional year is very serious in the eyes of *amici*. The child pornography industry is a lucrative business and prolonged periods of legal limbo raise the possibility that commercial child pornographers may attempt to profit from the loophole at the expense of our children.

## CONCLUSION

For the foregoing reasons, the judgment of the Supreme Judicial Court should be reversed and the conviction should be reinstated.

Respectfully submitted,

ELIZABETH K. SPAHN *
154 Stuart Street
Boston, MA 02116
(617) 451-0010
*Attorney for*
*Massachusetts Society for*
*Prevention of Cruelty*
*to Children*

* Counsel of Record

Dated July 21, 1988

# APPENDIX

# APPENDIX

## DESCRIPTION OF AMICI ORGANIZATIONS

*MASSACHUSETTS SOCIETY FOR PREVENTION OF CRUELTY TO CHILDREN* (MSPCC) was founded in 1878 as a statewide agency dedicated to improving family life and protecting children. MSPCC has a staff of 200 people and serves almost 10,000 clients annually, many of whom have been sexually abused. MSPCC provides a range of direct treatment services for sexual abuse victims and their families. MSPCC's experience is that child pornography perpetuates the sexual victimization of children with long term emotional consequences for the children exploited.

*National Organizations*

*AMERICAN HUMANE ASSOCIATION* for more than 112 years has led national efforts to protect children from abuse and neglect. As a nationwide association of agencies and individuals, AHA through its Children's Division provides training for health, law enforcement and legal professionals, brings expert assistance to state child protective programs, publishes research, promotes national standards and maintains a national data base on child abuse and neglect.

*CHILD WELFARE LEAGUE OF AMERICA* is a national organization comprised of 450 leading child welfare agencies in the United States and Canada with 1200 affiliates in 27 state associations. Founded in 1910 at the request of President Theodore Roosevelt, the Child Welfare League is the only privately supported organization in North America solely devoted to improving services for deprived, neglected and abused children whose membership includes both voluntary and public, religious and nonsectarian agencies.

*State Organizations*

*BOSTON CHILDREN'S SERVICE ASSOCIATION* is the successor to New England's oldest private charitable organization founded in 1799. In 1987 it served more than 2,500 children and families, many of whom had experienced child sexual abuse and child pornography. Its experience has shown that child pornography can cause lasting harm to children.

*BRIGHTSIDE FOR FAMILIES AND CHILDREN* based in Springfield, Mass., offers therapeutic treatment for children and their families in New England and New York. Founded in 1881, Brightside employs 160 people and served 4,830 clients in 1987.

*CAMBRIDGE FAMILY AND CHILDREN'S SERVICE* founded in 1873, provides counselling, adoption, mediation, support, training, rehabilitation and prevention programs. It has a 40 member professional staff and 50 trained volunteers.

*CATHOLIC CHARITIES—ARCHDIOCESE OF BOSTON* founded in 1903, is the major social service agency of the Roman Catholic Church in the greater Boston area. Catholic Charities serves people of all faiths and provides a wide range of social services to children. In 1987 more than 3,500 children were served through protective services, foster care and day care programs.

*COMMUNITY COUNSELLING CENTER OF BLACKSTONE VALLEY, INC.* is a community based agency providing substance abuse treatment, mental health and social services in the 15 towns of the Blackstone Valley in Massachusetts. CCC has 55 staff and serves 1,500 clients annually. Children and their families are the primary client population, and CCC provides treatment for victims of sexual abuse.

*COMMITTEE FOR HISPANIC CHILDREN AND FAMILIES, INC.* is a city wide agency in New York



City. CHCF provides cultural awareness training courses for social service providers working with Hispanic children and families, provides training in the Hispanic community on child abuse and neglect and provides policy development resources.

*DIMOCK COMMUNITY HEALTH CENTER* founded 115 years ago, it based in Roxbury, Massachusetts and provides comprehensive ambulatory health care services to the poor and near poor. It is one of the largest health centers in Boston and has a model health vocational training program with over a dozen independently operated health programs.

*FAMILY CONTINUITY PROGRAMS, INC.* offers a wide range of family treatment services with six offices throughout Massachusetts employing 80 full time staff. The agency has experienced ever increasing incidents of child sexual abuse cases since 1985.

*FAMILY SERVICE OF GREATER BOSTON* founded in 1835, is a voluntary human service organization providing sexual abuse treatment, drug and alcohol rehabilitation, advocacy programs, a licensed mental health clinic and a certified home health agency.

*THE HARBOR SCHOOLS, INC.* provides services to severely disturbed children and their families including crisis and ongoing family intervention, individual and group psychotherapy, job training, special education and alternative family placement.

*ITALIAN HOME FOR CHILDREN* is a long term residential treatment facility providing services to emotionally disturbed children of all races from Massachusetts and bordering New England states. Many of the 50 children between 5 and 13 years old accepted annually into its residential and emergency shelter programs have suffered sexual abuse. The Italian Home's experience is that child pornography causes long term emotional disturbance in most cases.

*KEY PROGRAM, INC.* serves troubled adolescents statewide with a staff of 300 serving 3,200 adolescents annually in residential and non-residential settings. Many of KEY's clients have a history of sexual abuse, including use of adolescents in pornographic material.

*MASSACHUSETTS ASSOCIATION FOR MENTAL HEALTH, INC.* founded in 1913 has chapters throughout the Commonwealth. MAMH is concerned with the growing number of sexually related child abuse cases and has found that child pornography is exploitation of defenseless minors.

*MASSACHUSETTS COUNCIL OF HUMAN SERVICE PROVIDERS* represents almost 600 nonprofit agencies providing a variety of human services. It is concerned with the development of sound, progressive social policies and works with the executive department, state legislature, state agencies, advocacy groups and philanthropic organizations.

*NEW BEDFORD CHILD AND FAMILY SERVICE* founded in 1843 serves southeastern Massachusetts, providing protective service to children who are victims of sexual abuse, their siblings and to perpetrators of child sexual abuse, in addition to other programs. It serves about 5,800 clients annually with a staff of 100.

*NEW ENGLAND HOME FOR LITTLE WANDERERS* founded in 1865 provides services to severely troubled children and their families, including residential treatment, day treatment, foster family placement and counselling. It has a staff of over 250 serving about 1,000 children annually, many of whom have been sexually abused. Child pornography has proven to be a destructive experience in the experience of the agency.

*PARENTS ANONYMOUS OF MASSACHUSETTS* assists parents in breaking the cycle of child abuse. It is a self-help organization providing safe, supportive weekly



meetings where parents under stress can discuss their problems. It serves over 2,000 people annually.

*SPRINGFIELD HOME FOR FRIENDLESS WOMEN AND CHILDREN, CHILDREN'S STUDY HOME* based in Springfield, Massachusetts is a multi-service agency founded in 1865 serving about 600 families annually with a staff of 100. It provides educational, day and residential treatment, therapy, and protective services to children.

*STEVENS—CHILDREN'S HOME, INC.* founded in the 1930s provides residential treatment for 30 emotionally disturbed boys experiencing serious behavioral problems. Over 33% of the boys are known victims of sexual abuse and have themselves become the sexual abusers of younger children. Child pornography clearly contributes to this serious problem in the experience of the agency.

*TRAVELERS AID SOCIETY OF BOSTON, INC.* serves the needs of a mobile population including runaway children, homeless, unemployed, deinstitutionalized people, refugees, abused women and tourists. TAS served 59,481 people in 1987 and provided counselling or emergency assistance to 4,930 people.

*UNITED WAY OF MASSACHUSETTS BAY, INC.* founded in 1935 conducts an annual volunteer fund raising drive which provides financial support to over 200 human service agencies. United Way agencies serve 1.7 million people in 81 cities and towns.

*WAYSIDE, INC.* operates eight programs serving adolescent children including an emergency shelter, group home and school, a day treatment program and transitional apartment program. A large percentage of children served have a history of sexual abuse which contributed to their inability to live and function in the community. Child pornography is child abuse in Wayside's experience.

*WOMEN'S ALLIANCE AGAINST PORNOGRAPHY*, Cambridge chapter, provides public education about the harms of pornography and advocates legislative reform efforts to address this abuse.

*WOMEN AND CHILDREN'S HEALTH ASSOCIATES* of Palmer, Alaska, provides services including prevention and early intervention for family violence and child abuse, and has provided leadership for statewide effort to prevent child sexual abuse.

*WORCESTER CHILDREN'S FRIEND SOCIETY* founded in 1849 provides mental health and advocacy services to about 1,000 children with a staff of 30. Over 35% of its clients are victims of physical or sexual abuse.

*YOUTH OPPORTUNITIES UNLIMITED, INC.* serves about 2,000 adolescent children with a staff of 60 annually providing residential treatment, counselling, special education and advocacy programs. Its experience with behaviorally disturbed adolescents demonstrates the myriad of problems occurring when children are sexually victimized.

*YOUTH OPPORTUNITIES UPHELD, INC.* served 1,348 children and their families with 90 staff providing preventative and rehabilitative social, psychological, educational and vocational services. The majority of Y.O.U.'s clients are victims of sexual abuse and it is their belief that child pornography contributes to this problem.

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In The

# Supreme Court of the United States

October Term, 1987

**COMMONWEALTH OF MASSACHUSETTS,**

*Petitioner,*

vs.

**DOUGLAS OAKES,**

*Respondent.*

**On Petition For**
**A Writ Of Certiorari To**
**The Supreme Judicial Court**
**of Massachusetts**

## BRIEF AMICUS CURIAE OF CITIZENS FOR DECENCY THROUGH LAW, INC. IN SUPPORT OF PETITIONER

**BRUCE A. TAYLOR**
**2845 E. Camelback Road**
**Suite 740**
**Phoenix, Arizona 85016**
**(602) 381-1322**

***Counsel of Record***
***For Amicus Curiae***

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## INTEREST OF CDL AS AMICUS CURIAE

### Consent

Citizens for Decency through Law, Inc. (CDL) has received consent of the parties to the filing of this brief amicus curiae. Consent of Respondent was received from his attorney, Mr. Richard Vita, Esq., and of Petitioner, from the Attorney General of Massachusetts.

### CDL's Interest in This Case

Citizens for Decency through Law, Inc. (CDL) was founded in 1957 by Charles H Keating, Jr. to provide a means for lawyers to assist prosecutors and police in enforcing and defending obscenity laws, to assist public officials improve and adopt

constitutional statutes and ordinances, and to assist local citizens and community leaders understand the role of the law and legal system in dealing with the social issue of pornography and sexual exploitation. CDL has a staff of former prosecuting attorneys with experience in obscenity cases which is available for this purpose. Mr. Keating and CDL have filed over fifty briefs on the merits and as amicus in the U.S. Supreme Court and have participated in trials and appeals in many states on the side of government and law enforcement officials. CDL also has affiliated chapters, all across this country, of independent citizens who wish to share in the experience of our staff. Such chapters and other citizens groups maintain their own structure and local objectives, but are advised by CDL of the legal precedent in their home

states and other jurisdictions where legal issues are decided that affect local action. Although citizens usually desire fast and certain solutions to their perceived problems, and often misunderstand the restrictions of the law and Constitution on such solutions, CDL maintains that the law can deal effectively with criminal abuses of prostitution, live sexual commercialization, and hard-core pornography. Child pornography is not such a publicly flaunted crime, however, and efforts to deal with its insideous evils are more complicated. The prevention of sexual exploitation of minors requires more extensive solutions and methods than merely attempting to control the traffic in the photographs of child abuse which take the form of sexual conduct and lewd exhibition of the genitals by minors.

Massachusetts sought to protect minors from such conduct and from the exploitation of sexually oriented nudity by minors.

CDL desires that this Court recognize this protection and the legitimate reach of child pornography laws to child nudity and submits this discussion of a few related issues involved in this decision.

* * *

## LAW AND ARGUMENT

Proposition of Law:

I. POST-PUBESCENT MINOR FEMALE BREASTS ARE PRIVATE SEXUAL AREAS ENTITLED TO THE PROTECTION OF LAW FROM SEXUAL EXPLOITATION, AND THE DECISION OF THE SUPREME JUDICIAL COURT OF MASSACHUSETTS VIOLATES THE CIVIL RIGHTS OF MINOR FEMALES BY FAILING TO EXTEND SUCH PROTECTION IN THAT REGARD.

In the case of pre-pubescent children, both boys and girls have only one private sexual area, which is the genital or pubic area. A photograph of a five or ten-year-old girl with only her chest area visible is not "child pornography" since her breasts are not yet developed as sexual organs or private parts. In this regard, pictures of pre-pubescent boys and girls are the same. Only their genital areas are private parts protected by sexual exploitation laws such as that of

Massachusetts, and that of New York as reviewed in New York v. Ferber, 458 U.S. 747, at 751 (1982).

The Massachusetts law under review, Section 29A, uses the term "nudity" as defined in Section 31 of the Mass. General Laws, and is set out by the Court below in Commonwealth v. Oakes, 401 Mass. 602, 518 N.E.2d 836, at 837, n.2 (Mass. 1988):

> "[N]udity" means "uncovered or less than opaquely covered post-pubertal human genitals, pubic areas, the post-pubertal human female breasts below a point immediately above the top of the areola, or the covered male genitals in a discernibly turgid state. For purposes of this definition a female breast is considered uncovered if the nipple or the nipple or areola only are covered. In the case of pre-pubertal persons nudity shall mean uncovered or less than opaquely covered pre-pubertal human genitals or pubic area." [Emphasis added.]

Several states have child pornography statutes which, like

Massachusetts, include the exhibition of minor female breasts as sexual exploitation (many of which are limited to sexually stimulating or erotic oriented exhibitions): Alabama, Colorado, Connecticut, Idaho, Iowa, Kansas, Kentucky, Maryland, Michigan, Mississippi, Nebraska, New Hampshire, Ohio, Pennsylvania, South Dakota, Utah, and Virginia. These laws may also be affected by this Court's decision in setting the scope of the Massachusetts statute.

Massachusetts law carefully distinguished between pre-pubescent private genital areas and post-pubertal genital and female breasts areas. Amicus submits that minor females between the age of puberty and adulthood are entitled to the protection of law from having their breasts sexually exploited, and it is a violation of

their civil rights to exclude these private parts from the reach of child sexual exploitation laws. Just as Congress has an interest in the civil rights of minorities, and therefore the power to pass statutes such as 42 U.S.C. Sections 1983 and 1985, the states have a compelling interest in the privacy rights of minors, and therefore the power to pass child pornography and exploitation statues such as those in New York and Massachusetts. See: Brown v. Board of Education, 347 U.S. 483 (1954); New York v. Ferber, supra; Ginsberg v. New York, 390 U.S. 629 (1968). See also: Annotation: Application of Civil Rights Act to Discrimination in Places of Entertainment, 7 A.L.R. Fed. 415.

A. The Sexual Exploitation Of Child Nudity Is A Legitimate Subject Of Legislative Acts.

In Ginsberg, supra, this Court upheld New York's right to prohibit sales to minors of visual representations of "nudity, sexual conduct or sado-masochistic abuse" which are "harmful to minors". Nudity was defined in the New York law in a similar scope as that of Massachusetts Section 31. See: Ginsburg, 390 U.S. at 645. The New York "harmful to minors" law was held not vague because it employed a test similar to that of obscenity and therefore gave adequate notice of its meaning and reach. The scienter element also prevented innocent applications and provided due process. Ginsberg, at 643-44.

The New York law prevented sales to minors of materials "harmful" to them

because "The State also has an independent interest in the well-being of its youth." Id. at 640. This interest does not depend on the supervision of parents and allows the states to act on behalf of and in loco parentis to children with reasonable and objective protections. The "harmful to minors" laws rightfully condemn material that is "a basic factor in impairing the ethical and moral development of our youth and a clear and present danger to the people of the state". Id. at 641. "Obscenity" laws do not have to meet the "clear and present danger" test because obscenity is unprotected by the First Amendment. Id. at 641, citing Roth v. U.S., 354 U.S. 476, at 486-87 1957). Nor did the federal broadcasting statute, since "indecency" is unprotected in mass communications media such as radio and television. F.C.C. v. Pacifica, 438

U.S. 726 (1978). Child pornography as defined in Ferber is also unprotected and need not pass this stricter test. Where the actual sexual exploitation of minors does constitute a "clear and present danger" to them and the people of the state, as New York found in passing the Ginsberg statute (Ginsberg at 641), and as this Court recognized as a "governmental objective of surpassing importance" in Ferber at 757, the extension in the Massachusetts statute under review is justified.

State legislatures "must be allowed a reasonable opportunity to experiment with solutions to admittedly serious problems", as this Court recognized in Young v. American Mini Theatres, 427 U.S. 50, at 71 (1976). As applied in this case, the Massachusetts law provides reasonable assistance in "safeguarding the physical and

psychological well-being of a minor" which was admitted to be a "compelling" interest in Globe Newspaper Co. v. Superior Court, 457 U.S. 596, at 607 (1982). The seriousness of the problem with many forms of child exploitation is also underscored by the caveat in Prince v. Massachusetts, 321 U.S. 158, at 168 (1944):

> A democratic society rests, for its continuance, upon the healthy, well-rounded growth of young people into full maturity as citizens, with all that implies. It may secure this against impeding restraints and dangers within a broad range of selection.

The studies and research of doctors, therapists, and other professionals in the field of child development and abuse were accepted in Ferber at 758-61, and fn.9-13, as supporting the "legislative judgment" that "the use of children as subjects of pornographic materials is harmful to the

physiological, emotional, and mental health of the child". See also the Brief Amicus Curiae filed by Covenant House in Ferber on Sept 9, 1981.

The Court accepted similar findings in Ginsberg, at 641-42, and fn.10, and quoted Dr. Gaylin on an important point central to the issue now before this Court:

> "[P]sychiatrists... made a distinction between the reading of pornography, as unlikely to be per se harmful, and the permitting of the reading of pornography, which was conceived as potentially destructive. The child is protected in his reading of pornography by the knowledge that it is pornographic, i.e., disapproved. It is outside of parental standards and not a part of his identification processes. To openly permit implies parental approval and even suggests seductive encouragement. If this is so of parental approval, it is equally so of societal approval-another potent influence on the developing ego."

A recent study by Dr. Judith Reisman for the U.S. Department of Justice, Office of Juvenile Justice and Delinquency Prevention (1987), proves that use of minors in media and men's magazines, and use of adults to portray minors for sexual arousal in such materials, has a devastating impact on youth by sexualizing them in the minds of adults and that this puts minor children at great risk of sexual exploitation and abuse. This study is reproduced as an Appendix hereto and is entitled "Executive Summary: Images of Children, Crime and Violence in Playboy, Penthouse and Hustler Magazines". This study has generated much controversy, and understandable criticism from the pornographic men's magazines and the American Civil Liberties Union, but its logic and proof speak for themselves, as a reading of the report will show. See

also the letter of Mr. John Rabun of the National Center for Missing and Exploited Children, which is also reproduced at page 43 of the Appendix hereto.

The Justice Department recognized that some of the illustrations in the report could fit within the scope of federal child pornography laws and this speaks clearly for the serious issue involved. These images were taken from publicly sold magazines and must be treated sensitively in scientific reports. The law should enforce the same sensitivity in the public marketplace where these pictures originally appeared. A reproduction of this letter from the D.O.J. is also included at page 46 of the Appendix hereto. To prevent further exposure, the photographs in the Reisman report were not reproduced in this Appendix.

(Forty copies of the full report have been lodged with the Clerk of this Court.) The study is particularly relevant here, since this case involved the Defendant-Respondent's taking of similar photos of his fourteen-year-old step-daughter under circumstances which indicate the photos, or other ones of the young woman, would someday have been published in one of these so-called "men's sophisticate magazines", also known as "soft-core porn magazines". The harm in this should be obvious and the legislative interest clear.

The Massachusetts Legislature sought to protect pre-pubescent minors from exploitation of their genital areas and to protect post-pubescent minors from exploitation of the genitals of teenage boys and of the genitals and breasts of teenage girls. This statutory structure encompasses the

private sexual areas of children at their respective stages of development and recognizes the privacy interests the different sexes have at these ages.

That female breasts are recognized as private sexual parts is beyond question. To remove protection from post-pubescent minor females to have their breasts considered private sexual areas in child pornography laws would be to deny them Equal Protection.

In California v. La Rue, 409 U.S. 109 (1972), this Court upheld the right of the states to ban "topless", as well as "bottomless", dancing by females in liquor establishments. This judgment was re-affirmed in New York State Liquor Authority v. Bellanca, 452 U.S. 714 (1981), and City of Newport v. Iacobucci, 479 U.S. ___, 93 L.Ed.2d 334 (1986). These decisions were not changed by that of Schad v. Borough of

Mt. Ephriam, 452 U.S. 61 (1981) where this Court said live entertainment, even if involving nudity, could not be arbitrarily discriminated against without an analysis of First Amendment and Equal Protection principles. The Court in Shad, at 66, did not rule that nude dancing was protected speech, nor did the Court in Doran v. Salem Inn, 422 U.S. 922, 932-33 (1975), but only ruled that a state or city could not pre-censor all such conduct without a rational basis directed at the specific conduct involved. Like the presumption of innocence in all criminal cases, a person's conduct may not be protected or lawful, but the government cannot treat him as if his conduct is totally unprotected or unlawful without due process. Public and commercial nudity is neither protected nor unprotected per se, the context determines the difference.

Justice Douglas and Black agreed in dissent that "no one would suggest that the First Amendment permits nudity in public places". Roth, 354 U.S. at 512. Likewise, no one should suggest that a young woman of 14 or 17 can dance "topless" in a bar or walk "topless" on a beach or down a city street. The Supreme Court of Indiana upheld that state's indecent exposure statute as applied to prohibit "topless" and "bottomless" dancing in bars, independent of the Twenty-First Amendment considerations of La Rue and Bellanca. In State v. Baysinger, 397 N.E.2d. 580 (Ind. 1979), the Court held that bars are public places (like they are in "civil rights" laws) and that women have no First Amendment right to expose their private parts (breasts or genitals) there, even for consenting

male voyeurs. As stated by the Court at 397 N.E.2d, 587:

> Under our statutes and case law, public nudity itself, regardless of a showing of obscenity, is conduct which traditionally has been held to be public indecency, which is within the power of the legislature to prohibit. There is no right to appear nude in public.... In the cases before us it is clear the activity involved is appearing nude or dancing in the nude in bars and is conduct.... The governmental interest in prohibiting conduct that has long been recognized as public indecency is unrelated to the suppression of free speech.

This judgment was affirmed on the merits by this Court in dismissing the appeal in Baysinger, for want of a substantial federal question, sub nom Clark v. Indiana, 446 U.S. 931 (1980). See: Hicks v. Miranda, 422 U.S. 332, at 344 (1975); Hopfmann v. Connolly, 471 U.S. 459, 460 (1985).

The Basinger rule was also upheld as applied to the "Miss Erotica of Fort Wayne" contest at Cinema Blue Theatre in Erhardt v. State, 468 N.E.2d 224 (Ind. 1984).

In O'Day v. King County, 749 P.2d 142, 147-48 (Wash. 1988), the Supreme Court of Washington limited a county ordinance regulation on nude entertainment to "pure conduct and obscene expression", and upheld its reach to nude conduct involving genitals and female breasts only within narrow limits. See also: BSA, Inc. v. King County, 804 F.2d 1104, 1106-08 (9th Cir. 1986).

Many courts assume that nude dancing is protected expression and can only be subject to limited time, place, and manner restrictions. Amicus submits that the states need not restrict indecent exposure and

commercial nudity laws so narrowly in response to this Court's decisions in Schad and Salem Inn, supra, as was done in O'Day v. King County, but that nude "entertainment" of the type in "topless bars", "nude bottle clubs", and even "porno houses" can be prohibited as unprotected conduct under the rule of Baysinger.

Actual sex acts on stage need not be the logical progression of these rulings, as in Mitchell v. Superior Court, 203 Cal.Rptr. 379 (Cal. App. 1984), and State v. House, 698 P.2d 951 (Or. 1985), before the state can protect its interests in public morality against commercial live sex shows. Modern "bump and grind" nude shows are as much the "crass commercial exploitation of sex" as are obscene pictures of such acts. See: Paris Adult Theatre v. Slaton, 413 U.S. 49, at 63, 67 (1973). See also:

SDJ, Inc. v. City of Houston, 837 F.2d 1268 (5th Cir. 1988); Fillingim v. Boone, 835 F.2d 1389 (11th Cir. 1988); D.C. v. City of St. Louis, 795 F.2d 652 (8th Cir. 1986); Intern. Food & Beverage Systems v. City of Ft. Lauderdale, 794 F.2d 1520 (11th Cir. 1986); KEV, Inc. v. Kitsap County, 793 F.2d 1053 (9th Cir. 1986); Guinther v. Wilkinson, 679 F.Supp. 1066 (D. Utah 1988); Bradfield v. Blesma, 675 F.Supp. 382 (W.D. Mich. 1987); Little v. City of Greenfield, 575 F.Supp. 656 (E.D. Wisc. 1983); Dydyn v. Dept. of Liquor Control, 531 A.2d 170 (Conn. App. 1987); City of Daytona Beach v. Percio, 476 So.2d 197 (Fla. 1985); Morris v. Municipal Court, 652 P.2d 51 (Cal. 1982); Mr. B's Bar and Lounge v. City of Louisville, 630 S.W.2d 564 (Ky. App. 1981); People v. Wilson, 291 N.W.2d 73 (Mich. App. 1980); Gabriel v. Town of Old Orchard Beach, 375 A.2d 1065 (Me.

1978); Expo, Inc. v. City of Passaic, 373 A.2d 1045 (N.J. Super. 1977); Wayside Rest. v. City of Virginia Beach, 208 S.E.2d 51 (Va. 1974).

Massachusetts has not escaped the problem of deciding if commercial sex and nudity are "protected" expressions. Cabaret Enterprises v. A.B.C. Comm'n., 468 N.E.2d 612 (Mass. 1984) (La Rue - Bellanca type law struck down on state constitutional grounds); Commonwealth v. Kocinski, 414 N.E.2d 378 (Mass. App. 1981) (obscenity convictions affirmed where bar "dancers" exposed and touched genitals and breasts); P.B.I.C., Inc. v. District Attorney, 258 N.E.2d 82 (Mass. 1970) (stage play "Hair" not enjoinable, since not "lewd and lacivious", but injunction issued to prevent nudity and simulated sex).

Whatever "constitutional" problems exist in deciding whether paying young

women to "dance" nude or semi-nude so bar patrons or "club members" can stare at their genitals or breasts while eating or drinking have not hampered the courts in upholding the police power of cities to prohibit topless or nude "sunbathing" in public. See: South Florida Free Beaches, Inc. v. City of Miami, 734 F.2d 608 (11th Cir. 1984); Williams v. Kleppe, 539 F.2d 803 (1st Cir. 1976); Chapin v. Town of Southhampton, 457 F.Supp. 1170 (E.D. N.Y. 1978); State v. Turner, 382 N.W.2d 252 (Minn. App. 1986).

Whatever their reach and scope, all these laws apply to male and female genitals and female breasts, and would cover all adults and post-pubertal minors. No one would suggest that teenage women can go "topless" on a public beach or in a public place or business, and the reason is that their

private parts include their breasts every bit as much as they do when women reach the age of majority. No artificial distinctions should be made in the case of child pornography and sexual exploitation laws either.

The state courts, on remand from this Court, have refused to follow the decision on constitutional grounds issued in several important cases, and have denied the people and law enforcement much needed remedies. See the remand decisions in New York State Liquor Authority v. Bellanca, supra, at 445 N.Y.S.2d 87, 429 N.E.2d 765 (N.Y. 1981); New York v. Ferber, supra, at 455 N.Y.S.2d 582, 441 N.E.2d 1100 (N.Y. 1982); New York v. P.J. Video, 475 U.S. ___, 89 L.Ed.2d 871 (1986), at 508 N.Y.S.2d 907, 501 N.E.2d 556 (N.Y. 1986); Arcara v. Cloud Books, 478 U.S. ___, 92 L.Ed.2d 568 (1986), at 510 N.Y.S.2d 844, 503

N.E.2d 492 (N.Y. 1986). Such a result could be avoided here by a ruling by this Court in terms of the civil rights of post-pubescent minor females to the Equal Protection of their private sexual areas. It is discriminatory to protect all of a minor boy's privates (genitals) and only protect half of a minor female's private parts (genitals but not breasts). It is not the fault of young women that they have breasts and genitals and that boys have genitals only.

The Massachusetts Legislature granted Equal Protection to minor boys and females, as did at least seventeen other states, in recognizing that a minor female's breasts can be sexually exploited as child pornography and prohibiting such improper conduct. The state Court below took away that protection from the minor females without justifying a departure from this

Court's ruling in Ferber that minors are entitled to protection from sexual exploitation and use in child pornography. This is not an area of law that should be left to a laissez faire option, such as obscenity. Paris Adult Theatre, 413 U.S. at 64. Minor children need and deserve protection from discrimination based on sex and age and the courts, like the state Court below, should not ignore the rule of Ferber when the result is to deny those rights.

B. The Court Below Erred In Striking The Statute As Overbroad On Its Face.

The Court below erred in applying the overbreadth analysis to this statute and should have upheld or construed the law to cover depictions of nudity by minors that could be prohibited as child pornography.

The Supreme Judicial Court of Massachusetts was wrong in Oakes, 518 N.E.2d at 837, when it said it "need not decide whether the Supreme Court would sustain a statute that was carefully directed against the defendant's conduct" in finding the statute "unconstitutionally overbroad" on its face. This Defendant should have to prove the statute vague or overbroad as to him. Parker v. Levy, 417 U.S. 733, 756 (1974). The Court below said the defendant "finds support for his position in New York v. Ferber", at

764-66, that his conduct was "protected speech". In fact, Ferber reversed the New York Court of Appeals for making the exact same error. The "traditional rule" that a person cannot challenge a law that validly applies to him, announced in Broadrick v. Oklahoma, 413 U.S. 601, 610 (1973), was found to be "sound and should be applied in the present context involving the harmful employment of children to make sexually explicit materials". Ferber, 458 U.S. at 767, 771. This use of the "substantial overbreadth" and "personal nature of constitutional rights" doctrines were found justified by the compelling interest in protecting minor children. The Court below in Oakes, at 838, used one hypothetical example as evidence of "substantial enough" overbreadth to strike the whole statute. The example was its assumption that

Section 29A "makes a criminal of a parent who takes a frontal view picture of his or her naked one-year-old running on a beach or romping in a wading pool". Nothing in the record even suggests that the law would be applied in this fashion, and the prosecutors and attorneys for Petitioners have rejected such assertions. The Court below did not even attempt to analyze the applications of this law by the guidelines of statutory interpretation set out for First Amendment laws in Brockett v. Spokane Arcades, 472 U.S. 491 (1985), and in failing to do so it mis-applied Ferber.

In Oakes, at 837, the Court below correctly noted that "defendant's conduct in permitting his stepdaughter to pose naked above the waist cannot fairly be isolated... from the expressive process of taking her

picture". The Court misrepresents the facts, however, in saying that Oakes "took nonpornographic, nonobscene photographs of his fifteen-year-old, consenting stepdaughter who was nude above the waist, in circumstances where no commercial or even noncommercial distribution was intended or occurred". Id. The record and Brief for Petitioner show that the Defendant took the pictures specifically to highlight her fourteen-year-old breasts. He did not accidentally get her exposed breasts on film while taking "innocent" pictures. He took pictures of her breasts. Simple and undeniably. He did so because breasts are a sexually stimulating portion of a young women's anatomy. He had her wear "Frederick's of Hollywood" lingerie to highlight this sexuality.

If he wanted to capture the essence of her personality, or her beauty as a

person, he would have focused on her face, her eyes, her expressions of thought and emotion that make a woman a person.

This form of pornography may not be obscene under the test and "examples" set out in Miller v. California, 413 U.S. 15, at 24-25 (1973), but its focus on her sexuality is certainly "pornographic" as used in footnote 2 of Miller and in Ginzburg v. United States 383 U.S. 463 (1966). As this Court said in Ward v. Illinois, 431 U.S. 767, at 773 (1977), the "Miller examples" were "not intended to be exhaustive", and that Miller did not extend protection to sado-masochistic materials, if obscenely described. Likewise, minor female breasts can be depicted indecently or pruriently and also lack protection.

Respondent's intent and product could also be "indecent" as in F.C.C. v. Pacifica Foundation, 438 U.S. 726, fn. 16 (1978). The "normal definition of 'indecent' merely refers to nonconformance with accepted standards of morality". Pacifica at 740. No evidence exists in this case that it is an acceptable moral standard for a step-father, or any parent or adult or even another minor, to take pictures of a fourteen-year-old girl's breasts. That is not the "community standard" intended by this Court when it mis-used the word "tolerance" in Smith v. United States, 431 U.S. 291, at 305 (1977). If it was, the people of Maine or Mississippi would have to "accept" the conduct of Oakes in this case merely because it is "tolerated" by the highest court in Massachusetts. See: Miller, supra at 32. Surely, such a standard of

morality does not exist in Las Vegas or New York City, any more than it does in Boston or Worcester. If it did, it should be the Respondent's burden to show that such conduct is not only "tolerated" but "accepted". Community standards should be "set by what is in fact accepted in the community as a whole", as the District Court charged in Smith (431 U.S. at 297-98), otherwise the tolerance of the exception would eliminate the norm of acceptability.

The protection of minors recognized in Ferber is necessarily based on the community's "compelling" duty to protect them from sexual exploitation, regardless of whether by the "hard-core pornography" of the obscene, or the "soft-core" exploitation evidenced in this case. The "slight social value" in having pictures available of a young woman's breasts before she reaches the

age of majority and consent are not present here, like the arguable presence in "educational, medical, or artistic works" mentioned in Ferber at 773. The facts of this case are not ripe for the "case-by-case analysis" to test the reach of the Massachusetts law to one-year-old babies on a beach. All this Court need decide here is whether Massachusetts may protect post-pubertal minor female breasts from sexually exploitive photographs. The Court below erred in failing to do so and striking the statute on such hypothetical overbreadth grounds.

C. <u>The Rights Of Minor Females To Be Free Of Sexual Exploitation Outweighs Any Expressive Use Of Such Exploitation</u>.

If young women are entitled to the right to have their breasts considered as private, then the statute protects her civil rights from a denial of Equal Protection and is valid. Whether Defendant Oakes is guilty of sexually exploiting his step-daughter in this instance was for the trial courts of Massachusetts to find beyond a reasonable doubt. The issue here is whether state law can prohibit sexually oriented photographs of breast nudity as child pornography.

This Court denied certiorari review of the decision of the Ohio Supreme Court which upheld a statute prohibiting the mere private possession of photographs of minors engaged in sexual conduct or lewd exhibition of the

genitals. State v. Meadows, 28 Ohio St.3d 43, 503 N.E.2d 697 (Ohio 1986), cert. denied 480 U.S. ___, 94 L.Ed.2d 771, 107 S.Ct. 1581 (1987). That state Court also upheld the Ohio statute prohibiting the private possession of photos of minors "in a state of nudity". State v. Modeen, 28 Ohio St.3d 64, 502 N.E.2d 634 (Ohio 1986), State v. Robinson, 28 Ohio St.3d 65, 502 N.E.2d 634 (Ohio 1986). Two other state supreme courts have also upheld their child pornography possession statutes. Felton v. State, ___ So.2d ___ (Ala. 1988), People v. Geever, 122 Ill.2d 313, 522 N.E.2d 1200 (Ill. 1988). At present, there are at least eighteen states which prohibit the private possession of child pornography: Minnesota, §617.247 (1983); Arizona, §13-3553 (1983); Nevada, §200.730 (1983); Alabama, §13A-12-192 (1984); Ohio, §§2907.321,

2907.322, 2907.323 (1984); Oklahoma, §1021.2 (1984); Washington, §9.68A.070 (1984); Texas, §43.26 (1985); Florida, §827.071(5) (1985); Utah, §76-5a-3(1985); Illinois, §11-20.1 (1985); Kansas, §21-3516 (1986); Georgia, §16-12-100 (1987); Missouri, §573.037 (1987); Idaho, §§18-1507(3)(b) and 18-1507A (1987); South Dakota, §22-22-23.1 (1987); Colorado, §18-6-403 (1988); and Nebraska, §_____ (1988).

The Ohio Supreme Court recently construed the possession of nudity oriented material statute, O.R.C. 2907.323(A)(3), in State v. Young, 37 Ohio St.3d 249, at 252, ___ N.E.2d ___ (Ohio 1988), to prohibit only "conduct which is not morally innocent, i.e., the possession or viewing of the described material for prurient purposes". The Court found that, so construed, the

statute was "not so broad as to outlaw all depictions of minors in a state of nudity, but rather only those depictions which constitute child pornography". Id. The Court also limited the "state of nudity" by a minor to "where such nudity constitutes a lewd exhibition or involves a graphic focus on the genitals". Id. Since the Ohio statute defines "nudity" to include female breasts as well as male and female genitals, it is unclear whether the Ohio Supreme Court continues to allow a "lewd exhibition" of a minor female breast "for prurient purposes" to constitute child pornography. This is a reasonable restriction on the reach of child pornography laws, as argued herein. The language in Ferber, 458 U.S. at 773, regarding the assumption that New York would not "widen the possible invalid reach of the statute by giving an

expansive construction to the proscription on 'lewd exhibition[s] of the genitals" should not prevent this interpretation. In Ferber, the New York statute defined child pornography as only including sexual activity and lewd exhibitions of the genitals, so this Court had no opportunity to decide whether the post-pubescent minor female breasts could be lewdly exhibited as child pornography.

This Court could agree that child pornography involving exhibitions of a minor's private sexual parts (genitals and breasts) are legitimately reached by child pornography and sexual exploitation laws where such exhibitions (even without actual sexual conduct or contact between persons) are "for prurient purposes". This limitation on child nudity would prevent the "morally innocent" portrayals of concern to this

Court in Ferber at 773 and to the Court below in Oakes at 838. Such a limitation to prurient uses was employed to eliminate vagueness in the zoning ordinance in City of Renton v. Playtime Theatre, Inc., 475 U.S. 55-56, fn. 4 (1986), and was the essence of Roth and Ginzburg v. U.S., supra. This Court should correct, however, the misconception in Brockett, supra, that "prurient" is limited to "shameful and morbid" and includes other adjectives to describe a sexual interest beyond a purely normal, healthy interest, such as erotic, lascivious, and an unhealthy or abnormal lust. See: Roth, 354 U.S. at 487, fn. 20; Ginzburg, 383 U.S. at 470; Mishkin v. New York, 383 U.S. 502, at 508-09 (1966); Miller, 413 U.S. at 18, fn. 2; Hamling v. United States, 418 U.S. 87, at 127-31 (1974); Pinkus v. United States, 436 U.S. 293, at 301-03

(1978). See also: Brockett, 472 U.S. at 496-98, 504-05, and fn. 8. This would avoid the abusive restrictions on prurience applied by the Court of Appeals in Brockett, sub nom J-R Distributors v. Eikenberry, 725 F.2d 482, at 490-92 (9th Cir. 1984), and the District Court in Goldstein v. Allain, 568 F.Supp. 1377, at 1385 (N.D. Miss. 1983). Limiting pictures of child nudity to the unhealthy or abnormally lustful, erotic, or lascivious would prevent overbroad applications, provide notice and avoid vagueness, and yet reach the truly pornographic uses of children who are photographed exposing their private sexual areas to the lure of the camera's permanent exploitation.

The error below was in assuming an unconstitutional application and striking the statute in contravention to Ferber and the rights of minor females.

The remedy is to recognize the right of state legislatures to protect the privacy rights of those young women from having their breasts exploited sexually. In this regard, the Massachusetts statute cannot be said to be totally unconstitutional on its face "in whatever manner and against whomever an effort might be made to apply it". Younger v. Harris, 401 U.S. 37, at 53-54 (1971), citing Watson v. Buck, 313 U.S. 387, at 402 (1941).

## CONCLUSION

The Supreme Judicial Court of Massachusetts improperly held that state's child nudity exploitation statute invalid by assuming an unconstitutional hypothetical application. In doing so, the Court below violated the rules of statutory interpretation applicable to child pornography and exploitation laws set out in New York v. Ferber.

More importantly, this decision creates a denial of Equal Protection for the privacy interests of minor females whose civil rights are violated when their developing breasts are not recognized as private sexual areas entitled to protection by society and legislative bodies from sexual exploitation.

Amicus also submits that the dissenting opinion of the Court below was correct and should be adopted by this Court.

For these reasons, in addition to those urged by Petitioner herein, the decision below should be corrected and reversed.

Respectfully submitted,
Citizens for Decency
through Law, Inc.

Bruce Taylor

Bruce A. Taylor
General Counsel
Attorney for Amicus

## CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of July, 1988, three copies of the foregoing Brief Amicus Curiae of Citizens for Decency through Law, Inc., were sent by U.S. Mail, postage prepaid, to:

Hon. James M. Shannon
Attorney General
Phyllis N. Segal, Esq.
A. John Pappalardo, Esq.
Deputy Attorneys General
Madelyn F. Wessel, Esq.
Judy G. Zeprun, Esq.
H. Reed Witherby, Esq.
Assistant Attorneys General
Commonwealth of Massachusetts
One Ashburton Place, Room 2001
Boston, Massachusetts 02108
(617) 727-2200
Attorneys for Petitioner

Richard J. Vita, Esq.
2 Oliver Street
Ninth Floor
Boston, Massachusetts 02109
(617) 426-6566
Attorney for Respondent

All parties required to be served have been served.

Bruce Taylor
Bruce A. Taylor
Attorney for Amicus

# APPENDIX

Executive Summary

# IMAGES OF CHILDREN, CRIME AND VIOLENCE IN PLAYBOY, PENTHOUSE AND HUSTLER MAGAZINES

This research was sponsored by Office of Juvenile Justice and Delinquency Prevention (OJJDP), United States Department of Justice, Project No. 84-JN-AX-K007, and carried out at The American University, Washington, DC, from February 1984 to November 1985 and delivered to OJJDP in November 1987. Principal Investigator was Judith A. Reisman, Ph.D.

While the complete three-volume Reisman Report is available from OJJDP, the agency shelves several drafts of various reports ostensibly written by Dr. Reisman. However, only the *November 1987* Reisman Report has been approved by the Peer Review Board and authenticated by the Principal Investigator. *The Overview, Volume I,* is recommended as a brief (503 page) synopsis of the research project and relevant information. All three volumes total nearly 2,000 pages. For further information contact Dr. Reisman at The Institute for Media Education, Box 7404, Arlington, VA 22207 (703-237-5455).

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# INTRODUCTION

## From *Preventing Sexual Abuse,* Summer 1986

A study to determine how pornography and violence in the media affect the incidence of sexual abuse/exploitation, family violence and juvenile delinquency was recently completed at American University in Washington, DC. The project was funded through the Office of Juvenile Justice and Delinquency Prevention (OJJDP) U.S. Department of Justice.

Dr. Judith Reisman, principal investigator for the study entitled "Children, Crime and Violence in the Pictorial Imagery of *Playboy, Penthouse* and *Hustler*" testified on the findings before the United States Attorney General's Commission on Pornography on November 21, 1985. Visual images of children in sexual and violent contexts were analyzed in 683 issues of the three adult magazines beginning with *Playboy's* initial December 1953 issue through *Playboy, Penthouse* and *Hustler* issues of December 1984. Researchers counted children in cartoons or photographs, and references to children in cartoon/photograph captions.

Each cartoon or photograph was examined for characteristics of the child or adult depicted, the activities in which the child was involved, the nature of the activity, and the state of dress or undress of the child. Pseudo-children (adults dressed and posed as children) and any discrepant body features, such as oversized breasts on small child's frame, were also noted.

The study identified three basic themes: nonsexual, nonviolent activities such as simple memories; violent activities such as murder, maiming or surgical procedures; and sexual activities such as intercourse or a child appearing nude.

A total of 6,004 photographs, illustrations and cartoons depicting children appeared in the 683 magazines. *Hustler* depicted children most often, an average of 14.1 times per issue, followed by *Playboy* (8.2 times per issue) and *Penthouse* (6.4 times per issue).

Findings included the following:

- 1,675 child images were associated with nudity.
- 1,225 child images were associated with genital activity.
- 989 child images were associated sexually with adults.
- 792 adults were portrayed as pseudo-children.
- 592 child images were associated with force.
- 267 child images were associated with sex with animals or objects.
- 51% of the child cartoons and 46% of the child photographs showed children age 3-11.
- More girls than boys were associated with sexual assault.
- More boys than girls were associated with violent assault.

* Almost all depictions of child sexual abuse portrayed the child as unharmed or benefited by the activity.

From 1954 to 1984, these 6,004 images of children were interspersed with 15,000 images of crime and violence, 35,000 female breasts and 9,000 female genitalia.

*Playboy*, *Penthouse* and *Hustler* were chosen for the study because they are the three top-selling erotic/pornographic magazines. Approximately 25% of the professional adult male population reads at least one of these three magazines. In addition, *Playboy* and *Penthouse* are accessible to juveniles since they are available at newsstands, hotel lobbies, airports, college bookstores and in the home.

*Playboy* reaches 15,584,000 people per issue, *Penthouse* 7,673,000 and *Hustler* 4,303,000. This compares to *Psychology Today* with 4,704,000 readers, *Sports Illustrated* with 13,034,000 and *Ms.* with 1,635,000.

## Conclusions and Recommendations:

The study attempted to draw conclusions about the effects of the images on juvenile and adult readers, and explore the possible role of the magazines as sources of sex education.

Several issues were raised for future study:

1. The role of these magazines in making children more acceptable as objects of abuse, neglect and mistreatment, especially sexual abuse and exploitation.

2. The possibility that these images of children reduce taboos and inhibitions restraining abusive, neglectful or exploitative behavior toward children.

3. The possible trivialization of child maltreatment in the minds of readers; and,

4. The consequences of presenting sexual and violent images of children in magazines that call attention to sexual and/or violent activity.

Dr. Reisman recommended the National Institute of Mental Health, the Department of Justice and child welfare agencies cooperate to address the problem of pornography in our society through the use of task forces and research efforts.

She further recommended a voluntary moratorium on child or pseudo-child images until verifiable research can be conducted on the harm factor. Such action by sex-industry representatives could be seen as an act for responsibility based on concern for the welfare of children, rather than an admission of guilt.



# EXTERNAL REVIEW BOARD FOR IMAGES OF CHILDREN, CRIME AND VIOLENCE IN PLAYBOY, PENTHOUSE, AND HUSTLER MAGAZINES:

**Cooperative Agreement #84-JN-AX-K007**

Dr. George Comstock, Samuel I. Newhouse Professor of Public Communication at Syracuse University, is a foremost authority on television and social behavior. His work, in part, has focused on mass media and its effects on social values, social institutions, and, in particular, the young viewing public. Dr. Comstock serves on the editorial boards of several major communication journals, is a member of the National Council for Children and Television and was senior author/editor for the *Surgeon General's Report on Television and Human Behavior* (1978). His extensive work in the area of mass media has yielded numerous books and articles which are seen as a foundation for this field.

Dr. Robert Figlio is an Associate Professor of Criminology at the University of Pennsylvania. His critique of the unauthorized American University draft was helpful in the identification of issues and data requiring clarification, addition and correction. With Dr. Marvin Wolfgang, Dr. Figlio co-authored the Department of Justice "National Survey of Crime Severity." He is the only original peer who was unable to review and evaluate this final technical version written by the Principal Investigator.

Ms. Jane Huntington is a specialist in the area of juvenile justice. She is past Director of the Juvenile Justice Project of the American Red Cross, and served as Juvenile Justice Coordinator for the National Coalition for jail reform. Ms. Huntington has written widely in the area of sexual crime and juvenile behavior.

Dr. Emanuel Landau is an epidemiologist and statistical analyst whose specialty is the critique of large-scale, complex research designs. As a senior statistician, Landau, past Chairman of the American Statistical Association Committee on Statistics and Environment, served as the outside, anonymous, expert selected by the American University to evaluate project methodology.

Ms. Laura Lederer is Program Officer for the L.J. Skaggs and Mary C. Skaggs Foundation, and one of the country's leading experts on pornography. She is author and editor of the well-known work *Take Back the Night: Women on Pornography*, and in 1977 established the organization Women Against Violence in Pornography and Media (WAVPM). Ms. Lederer's unique knowledge of both grant management and pornography research have been an invaluable asset to the advisory board.

Dr. Richard Zakia is Chairman of the Fine Art Photography Department of the Rochester Institute of Technology and brings to the board his expertise on educational psychology, photography,

photographic education, and visual perception. Dr. Zakia published numerous books and articles on photography and visual perception, presented papers, lectures, and conducted workshops in the U.S. and Canada as well as contributing an excellent analysis of photography for the final Volume I Overview for the Reisman Report.

### Supplementary Critiques:

Edward Eichel, is a certified psychotherapist and consultant in Health Education/Human Sexuality and Family Life Education in New York City.

Gordon Muir, M.D., Director of Medical Communications at Glaxo Research Laboratories is responsible for the evaluation of medical research protocol and is also associated with the North Carolina Chapter of the National Committee for the Prevention of Child Abuse.

Linnea Smith, M.D., is a psychiatrist whose professional role in the Collegiate Athletic Community involves the education of athletes and coaches on the treatment of illicit drugs in mainstream, sexually explicit mass media.

Dr. Dorothy Tennov, discoverer of "limerence," past tenured professor of Psychology at the University of Bridgeport, is a clinical psychotherapist, theorist and author of three books on psychology.

Dr. Marianne Wamboldt is a psychiatrist, formerly of the Department of Health and Human Services, Section on Comparative Studies of Brain and Behavior; and Dr. Janet Negley is a psychologist with The California Psychotherapy Association.

## Comments of Members of the External Review Board

### George Comstock, S.I. Newhouse Professor of Public Communications

I have reviewed the draft of your report of November, 1986, *Children, Crime and Violence in the Pictorial Imagery of Playboy, Penthouse and Hustler*. My judgement as a scholar of the empirical investigation of the social influence of the communications media is that:

1. The research meets the usual criteria and standards for such endeavors, and suffers from no problems or weaknesses not common to the genre of research represented.

2. Its findings should be of value to those interested in popular culture, erotica or pornography, and the effects of erotica, pornography, and violence in the media, and particularly to those concerned with the implications of such phenomena for women and children.



3. The synthesis of marketing data, child abuse statistics, the media effects literature, and various psychological formulations relating to media effects is adventuresome, intriguing and an admirable exercise in that necessary human venture, thinking the unthinkable.

The document is of sufficient comprehensibility and completeness for submission to a sponsoring agency as the draft of a final technical version. This was not true of the version prepared by the American University.

### Jane Huntington

I have reviewed the Executive Summary of your final project report and the letters that you sent me.

As you know, I have studied juvenile justice issues as part of my master's course at the School of Justice at The American University, and I have participated in projects funded by the Office of Juvenile Justice & Delinquency Prevention, particularly dealing with early intervention strategies. I must advise you that I am no longer working in juvenile justice; however, as I observed to you in the initial stages of the project, I believe your research would be of interest to child protection workers as well as to any professionals who interact with youthful sex offenders. Again, as I have stated before, I find the "child magnets" concept of particular interest.

Your research presents a longitudinal content analysis of child representations in the three magazines examined. As I see it, the research provides a data base of child images in "mainstream erotica/pornography" (which you state in your introduction was a purpose of this "exploratory research"). Though I am not a researcher and cannot speak to the statistical methodology, my lay conclusion is the same as Dr. Landau's in that the "content analysis did adequately test the hypotheses of the study regarding representation of children in the three magazines with special reference to sexual and violence contexts. The findings are clearly of interest but the possible adverse effects from such presentation cannot therefore be inferred."

Dr. Zakia, also, points out that this was a "survey, a content analysis," and, as such, I agree that it ought to be published. Your research has constructed a base upon which to build further research studies. However, at this point, the research itself cannot be the basis for any conclusions and recommendations, other than for further research and, of course, of the empirical findings of the child images in mainstream erotica/pornography.

## Excerpts from Dr. Emanuel Landau's Review*

Volume I of the report, which represents an overview of the project, presents the necessary background material which the reader should have to understand the relevance of this project to the broader issue. The introduction states that "The overall objective of the study was to ascertain whether and to what extent representations of children exist in *Playboy*, *Penthouse* and *Hustler* magazines. The particular focus of the study was the depiction of "children" in sexual and violent contexts." This project, representing a content analysis of the three mentioned journals, constituted an attempt to deal with the broader issue of "The Role of Pornography and Media Violence in Family Violence, Sexual Abuse and Exploitation and Juvenile Delinquency."

The study was designed as a longitudinal study. The report says "Most importantly, the study provides an exhaustive analysis of the roles played by children in *Playboy*, *Penthouse* and *Hustler* magazines over time" (p.1a).

I have reviewed Volumes II and III of the study entitled "A Content Analysis of *Playboy, Penthouse* and *Hustler" magazines with* special attention to the portrayal of children, crime, and violence with considerable care. The review consisted of several examinations to ensure that I could find no significant error of commission or omission which could bias the result regardless of the overall quality of conduct of the study (p.1b). [Page numbers in this section refer to the original documents.]

Having participated in several large-scale studies involving the preparation of complex coding manuals and training of coders, I appreciated the care with which this operation was conducted. The project clearly demonstrated the awareness of the professional staff to the necessity for pilot or pre-testing and the comparability of the coders' entries. This concern for the form of the questions with its interpretation is needed in any study, but especially in this one where objectivity is so difficult to maintain in the coding group. Many of the questions raised in this review process were also perceived by the Principal Investigator and are discussed in the section on "Limitations of the Study" (p.2).

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*These statements are excerpts from Dr. Landau's 13-page evaluation. On August 13, 1987 Dr. Landau wrote: "Having noted the August 1987 materials planned for delivery to OJJDP, I wish to reaffirm my original August 1986 sentence regarding the methodology used in this research. "This is a sound study, producing high quality data in a complex and difficult area conducted in a scientifically acceptable fashion."



The care attached to coding applied also to the data handling in order to minimize the likelihood of error. Thus far, simple frequencies and cross-tabulations have been carried out. There are a large number of additional unpublished tabulations available from the project files (p.8).

The meticulous care with which the project attempted to deal with the "overall objective of the study...was to ascertain whether and to what extent representations of children exist in *Playboy, Penthouse* and *Hustler* magazines. To describe the environments in which the depictions occurred, the portrayal of crime and violence without children was also studied" (p.3).

The pattern of training for specific questionnaires followed by actual coding represents, in my judgment, an excellent way to maximize efficiency and minimize errors. The text notes that a guide to sexual drug-related slang terms was developed for the child visual and adult crime portions (p.7).

Noticeable throughout the report is the emphasis on quality control. It is clear that quality control was rigidly enforced from the initial assignment of magazines to the completed coding (p.7).

The discussion of "child magnets" i.e., the presence of Santa Claus and fairy tale characters is believed to be new and of interest. The depiction of children as initiating, receiving or observing sexual or violent activity with Santa Claus may be of consequence as is also the appearance of children as adult sexual partners in the fairy tale illustrations (p.3a).

The training of the coders involved a meticulous procedure of training and practice on the Child Cartoon Coding Instrument. Inter-rater reliability was assessed at the conclusion of coding and coders were debriefed to document their unique approaches to the content analysis (p.7).

It is my judgment that this content analysis did adequately test the hypothesis of the study regarding representation of children in the three magazines with special reference to sexual and violence contexts. The findings are clearly of interest but the possible adverse effects from such presentation cannot therefore be inferred (p.4).

Volume I also demonstrates a carefully conducted study of the content of the three journals constituting the mainstream of erotic/pornographic publications (p.4a).

In summary, the statement of limitations notes in detail the shortcomings of this study. However, in my judgment, the authors have tended to overstate the imperfect qualities of this content analysis study. It is a sound study providing high-quality data in a complex and difficult area conducted in a scientifically acceptable fashion (p.12).

## Laura J. Lederer

I write to congratulate you on the successful completion of your study, "Children, Crime, and Violence in the Pictorial Imagery of *Playboy*, *Penthouse* and *Hustler*: The Role of Pornography and Media Violence in Family Violence, Sexual Abuse, and Exploitation, and Juvenile Delinquency." Your research is of tremendous value. It is the first study ever to document the complete representation of children, children depicted in sexual situations, and children depicted in criminal and violent situations in *Playboy*, *Penthouse* and *Hustler* magazines, the three leading mainstream pornography magazines in our country. It documents these images over time, which makes it possible to pinpoint the introduction of such images into the social fabric. It also makes it possible to trace the proliferation of certain themes, such as child assault, child sexual molestation, and incest and to correlate the increases in these images with reportings of real life crimes against children. In addition, the study yielded an enormous amount of invaluable data never before gathered. It is now possible to identify the age of the children portrayed in these magazines and to note that the largest number portrayed were between the ages of three and 11, to identify the race and religion of these children, as well as their sex. The data can be identified for any one of the three magazines, or a pooled figure representing all three magazines can be found. The data also identify criminal and violent activities such as rape, battery and murder. These data can be used by other researchers, as well as police, child protection agencies, physicians, nurses, clinical therapists, educators, government officials and others who now work in various capacities to halt child abuse, child sexual molestation, and incest, as well as all forms of juvenile delinquency.

As a foundation program director of a private philanthropic foundation, I can say that the grant was properly administered and well-used. This was an enormous undertaking: a large-scale study with complex coding processes, housed in a university, which took a good percentage of the original grant amount to cover overhead costs. As principal researcher, you set up the research parameters, tested them with preliminary studies, and then ran the project within a two year time limit, employing over 30 people, including 25 coders, a complete administrative team, and a dozen expert consultants.

I urge the immediate publication of your final report dated November 1986, and its full distribution, by the U.S. Department of Justice and the Office of Juvenile Justice and Delinquency Prevention. I know that the American public very much wants to read the final report, and I believe that our society will reap benefits from it.



## Dr. Richard D. Zakia

Thank you for the opportunity to read your report on "The Role of Pornography and Media Violence..." and to offer some comments. First let me again state my position that the data you have gathered is important and should be made available to serious researchers along with valid qualifying statements and criticism you have included in your November 1986 Report. Let me outline some of the things I find especially valuable in your report:

**1. Benchmark**

Your data on the cartoons in *Playboy*, *Penthouse* and *Hustler* provide a reference point that we never before had. This is important for longitudinal studies and for possible comparison with other similar information; i.e., cartoons and visuals in other magazines.

**2. Methodology**

The instruments you developed for your study and your approach in establishing verbal categories for pictorial information can be very helpful to others.

**3. Correlations**

Your findings on the number of cartoons in which the principal child is "School age to puberty: elementary school age six through eleven" raises an important question. Do national statistics on child molesting reveal a similar situation. In other words are most children that are molested between the ages of six-eleven?

**4. Cartoonists**

Of the several cartoonists mentioned, the one most often used by *Hustler* magazine was Dwaine B. Tinsley by a margin of twice the next most used cartoonist. Can the Tinsley cartoons be isolated and studied between the years 1974 to 1984? This could uncover useful information regarding cartoon codes and possible changes which might have emerged. Do cartoons such as Tinsley's have historical precedence? Having done some visual research in the Kinsey Library on Sex and Human Reproduction at the University of Indiana, I believe they do and can be identified in the collection of pornographic visuals available there to researchers. Some of these visuals are by well known artists of earlier years.

**5. Similar but Different**

The cartoons in all three magazines although somewhat similar are also different. *Playboy* for example is more verbal while *Hustler* is blatantly visual. *Hustler* cartoons also portray more violence and contain ethnic slurs. How do other "girlie" magazines compare?

**6. Syntax**

The placement of cartoons on a page along with specific articles and advertisements, the size of the cartoons, left page vs. right page, black-and-white vs. color is of significance and provides information

not previously available. Your "eye scan" data points out the importance of judging the cartoons for not only what is within the cartoon but also for what lies outside the cartoon. Perceptual psychologists would find this very useful information.

7. **Body Validation**

Your proposed Body Validation instrument could be very useful to researchers in the field. What we see, and sometimes often mistake as a photograph of a nude woman, is often a retouched photograph with "visual transplants". By that I mean we now have the technology to create a real, imaginary, fantasized perfect nude woman. Computers can store pictorial body parts, faces, noses, hands, legs, breasts, etc., and display them on a screen for an artist to composite. The final fantasized Venus can then be directly transferred onto printing plates and then into magazines for the voyeuristic eye. The face of a 20-year-old can be connected to the body of a 16-year-old. Your proposed Body Validation instrument warrants further study and testing.

8. **Comparisons**

Do any of your findings support or question the voluminous Meese Report?

9. **Kinsey Library**

As you know, the Kinsey Library is an important resource for researchers in the field of human sexuality. The library has an outstanding collection of texts and visuals, including a considerable amount of material, historical and contemporary, on the involvement of children in sexual situations. Some of the material is in cartoon form and some pictorial visuals. I am sure that the Kinsey Library would welcome a copy of your report for their collection.

10. **Heuristic**

Another important aspect of your study is its heuristic value; it raises what I would call a Janus question. Looking back into earlier publications, what child cartoons preceded the ones your study found? And looking forward, particularly as the electronic media begins to take over with its moving image and sound, where is this type of erotica headed? We now have an important benchmark for *Playboy*, *Penthouse* and *Hustler* for the years 1953-1984, 1969 to 1984 and 1974 to 1984 respectively.

I hope the Justice Department will soon make your report available to serious researchers in the field. As a member of your peer group I concur with my colleague Dr. Landau that the criticism of your report has been overstated. It has tended to obscure the important data your research has uncovered. It was a survey, a content analysis of particular information. Perhaps it should be formally titled "A Survey of ...".



## J. Gordon Muir, M.D.

Thank you for the opportunity to review Volume I of your report "Children, Crime and Violence in the Pictorial Imagery of *Playboy*, *Penthouse* and *Hustler*."

By way of background, I am a physician with six years of experience in the clinical research departments of two of this country's leading pharmaceutical companies. I have been assistant director of clinical development and associate director of medical communications at the Squibb Institute for Medical Research, and I am currently director of medical communication at Glaxo Research Laboratories. In this environment I have been fully exposed to the principles and practice of sound medical research and its proper presentation. I have also been lately associated with the North Carolina Chapter of the National Committee for Prevention of Child Abuse, and partly because of this interest and what I recently have been learning about child abuse, I feel that the subject of your research is important, timely and of considerable public interest.

Just as physicians (and the public) have had a growing interest in the role of television in child abuse (see Wharton and Mandell, *Pediatrics*, June 1985), there would undoubtedly be a similar interest in the role, if any, of mainstream pornography. Now, for the first time, major documentation has been provided regarding how children are depicted in mainstream pornography and how images of children are related to situations of nudity, abuse, crime and violence. This has to be an important body of data and an important first step, if the methodology of data collection has been sufficiently rigorous. My own view is that the methodology employed here has been more than sufficiently exacting. And, while some modifications may be suggested for the future, I would concur with the statistical reviewer, Dr. Landau, that this is "a sound study providing high-quality data in a complex and difficult area, conducted in a scientifically sound fashion."

My chief conclusions from reading this report are as follows:

1. Children have been extensively sexualized in mainstream pornography. Documentation of this point alone is an important finding.

2. It is clearly established that there has been a pictorial trivialization of child sex abuse—particularly in cartoons. And as Harrison is quoted as saying in this report: "The cartoon is a unique force in modern society."

Socialization of other taboos, in cartoons especially, is also documented.

Bearing in mind that everyone is influenced in some way by what they see and read, it is absolutely essential that the impact of these child representations on both adults and children be further investigated. We are not dealing here with the content of television soap

operas, etc. but with a pictorial medium that is seen to have a record of portraying the breaching of the most sensitive social taboos as a subject for humor. Serious investigation of the impact of this should now begin.

I commend you and your staff for an admirable execution of a complex task performed in a relatively short period of time. I look forward to the Department of Justice making this report available to the medical and child-welfare communities, as well as to the general public.

## Linnea W. Smith, M.D.

The significance of your research cannot be overestimated, that of undertaking the most comprehensive to date content analysis of the three topgrossing erotic/pornographic magazines. This information is an invaluable precursor for the scientific community as well as society to critically evaluate issues of causation and potential for distortion of attitudes on human sexuality and antisocial behavioral impact.

There has been appropriate criticism of those of us in the medical profession in general, as well as those of us in psychiatry specifically, to be more cognizant of the role of mass media and its impact on the well-being of juveniles and adults.

These publications target juveniles as an important part of their readership and aggressively market their product to this segment of sexual identity. Your analysis of the depictions of children in a sexual and/or violent context is especially pertinent. Recent surveys confirm an overwhelming majority of adolescents reported repeated exposure to this material.

Research examining the effect of precocious exposure to pornography on children's attitudes and behavior is seriously inadequate. Children must be assumed vulnerable to adverse health consequences unless and until proved otherwise.

It is imperative that your report be made available immediately to the general public. It is beyond comprehension that additional data currently in the possession of American Univerity is not accessible to you or made available to other researchers.

## Dorothy Tennov, Ph.D.

My Ph.D. (U. Connecticut, 1964) is in experimental psychology with emphasis on learning and on methodology in behavioral science. I conduct basic research, am a consulting psychologist (Lic., Conn), have attained the academic rank of tenured Professor (U. Bridgeport), taught behavioral psychology, research design, and statistics (U. Connecticut, U. Bridgeport, Hunter Coll.), and have published articles in professional journals and three scholarly books. I am a member in good standing of national and international professional organizations including the American Psychological Association and the International Society for Human Ethology. In recent years my



research and theory focused on interpersonal sexual-affectional attractions in a context of the ethology of human reproduction and on the biological and social implications of reproductive technologies.

I have complied with your request that I review "Images of Children, Crime and Violence in *Playboy*, *Penthouse* and *Hustler* Magazines." A full report is to follow, but in summary I feel your research is on the cutting edge of crucial social issues and that you have produced, on a subject of intense controversy, valuable and reliable data. I am most interested in the results of the additional data analyses as well as additional projected research.

I congratulate you on your perseverance in the presence of the unique obstacles that working with these materials produce. The reactions evoked by your work—of officials, participants, colleagues, and the public—to the very subject of pornography reveal an aspect of human nature that must be understood if we are to behave responsibly as a society. In conjunction with other recent data on violence and abuse your findings confirm that our children are in jeopardy.

## Dr. Marianne Z. Wamboldt and Dr. Janet Negley*

The eighteen examples offered for evaluation seemed to be representative of several themes in current pornography: The association of sex with violence, the depiction of adult grown women as children and the association of childhood symbols and fantasies with sexual acts.

In addition to those pictures where women are dressed as girls, I would like to make a few comments on those comics and visuals in which childhood fantasies and heroes are used. As in the series of increasingly more explicit pictures using Wizard of Oz characters, it seems that pornography is seeking to be more and more outrageous... So, we see priests, Santa Claus and the Tin Man in sexual postures... The real difficulty with these images is that they carry messages beyond "isn't this funny—it's so naughty" which are only seen clearly if one gets beyond the initial response or if one is sensitized to the greater issues at play.

The increasing explicitness of the pornographic images is reminiscent of an addiction. More and more is needed to create the same effect. . .But with the number one complaint in sexual therapy being "a lack of desire," one must wonder just what it takes to get stimulated these days. A possibility is that we are all affected by the amount of sexual input and respond by shutting down.

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*Excerpts from Dr.'s Wamboldt and Negley's seven-page critique of eighteen sample images selected from *Playboy*, *Penthouse* and *Hustler*.

Repeated exposure to sexual scenes with adolescent (or younger) girls could stimulate hidden sexual feelings towards young girls which the man had been keeping at bay. There is also an inherent permission given to indulge in this kind of sexual behavior when viewed in the media. Of particular concern is the relationship of step-parent to step-child, particularly stepfathers and stepdaughters.

As mental health professionals, we can postulate that pornography has deleterious effects on some individuals. First of all, some men may have difficulty separating the use of women as sex objects from their everyday dealings with women in their lives. This comment pertains to pornography in general. The use of childhood heroes and fantasies adds even more complexity to the problem.

One possible dangerous effect of these pictures is that they disinhibit the prohibition, making less secure people more aware of inappropriate sexual feelings and more confused about what to do about them. Repeated exposure to sexual scenes with adolescent (or younger) girls could stimulate hidden sexual feelings towards young girls which the man had been keeping at bay.

There is also an inherent permission given to indulge in this kind of sexual behavior when viewed in the media. Of particular concern is the relationship of step-parent to step-child, particularly stepfathers and stepdaughters. These pairs do not share a long history of nurturance; often a stepfather first meets his prospective stepdaughter as she is entering puberty. In fact, the literary story of Lolita describes a situation where the stepfather married the mother because of his attraction to her daughter. Without a history to help suppress sexual feelings, these pairs often must consciously do so. To have media present scenes of child seduction may make it more difficult for men to consciously suppress these feelings.

The magazine editors will surely say they are only interested in stimulating fantasy, not illegal acts. But to a person who has difficulty separating fantasy from reality, the magazine gives tremendously confusing messages; for instance, some men may use the presence of these scenes as support for the notion that "women must like this or they wouldn't have posed for it."

If...adolescents view confusing pictures of "sexualized children" or cartoons about adult men, often fantasy heroes (especially Darth Vader) sexually using children, their dual developmental drives of becoming sexual as well as nurturant adults may blend, blur and be confused. . .adding visual portrayal of child sexual abuse may indeed trigger actual acting out, particularly in younger teens who have not developed good impulse control over their new and overwhelming sexual feelings.



**Edward W. Eichel, M.A.**

In reviewing your research on pornography, I can say from my twenty years of experience as a sexologist that you have gone to the heart of the matter. Let me identify several points that I wish to touch on:

1. Your market research and additional other reviews of the literature are an important contribution to our understanding of the complex role of commercial sex information in our nation's life.

2. As a sex researcher, it is of grave concern for me to discover that the materials under investigation have been instructing both juvenile and adult readers about the desirability of children as sex partners and the harmlessness of early sexual activity for children. The fact that this type of visual education is mass distributed in magazines, I consider another key finding. This makes me wonder about the source of inspiration for some of the bizarre sexual behaviors—auto-erotic asphyxiation, for example, which has been responsible for numerous fatalities amongst juveniles.

3. Your identification of "Child Magnets" in each of the magazines adds fresh insight to the impact of these materials on juvenile readers. This information would be very useful to sexologists, child development specialists, and a broad spectrum of child welfare workers.

4. The attention given to the pairing of violent, sexual, and juvenile stimuli—within this sex education medium—raises the issue of visual communication to new levels of complexity and scholarly concern.

In my opinion you have raised some powerful questions for the research community and provided basic data to assist in answering at least some of those questions. The data you provide on juvenile stimuli suggest a simultaneous arousal of both genital responses and fear responses in some viewers. I consider these findings important and suspect they will be the basis for major steps in resolving the problem of defining "pornography." Congratulations, I look forward to your report being made available to professional researchers and to the public at large.

# CONTENT ANALYSIS OF IMAGES OF CHILDREN, CRIME AND VIOLENCE IN PLAYBOY, PENTHOUSE AND HUSTLER EXECUTIVE SUMMARY


## ABSTRACT

Mainstream erotica/pornography is generally said to portray non-violent adult female nudity for an adult audience. However, a content analysis of *Playboy* (N=373), *Penthouse* (N=184), and *Hustler* (N=126) magazines, December 1953 to December 1984, yielded 6,004 child images as well as an estimated 14,854 images of crime and violence. Received both by juvenile and adult readers, newsstand available child imagery in the context of erotica/pornography increased nearly 2,600% (16 to 412) from 1954 to 1984 peaking in 1978 at 465 newsstand available depictions. Nearly two-thirds of the child scenarios were sexual and/or violent; the dominant age bracket 3-11 years; girls more prevalent than boys and most likely associated with adult males; and racial portrayals almost exclusively Caucasian. Close to 1,000 sexual scenarios included children with adults; 80% of the children were actively involved in all scenes; and each magazine portrayed children as unharmed and/or benefited by adult-child sex.

Juxtaposed with some 50,000 images of adult female nudity, the 6,004 child depictions were also associated with 14,854 images of adult crime and violence. In the latter, young-adult Caucasian males and females were equally victimized with primary offenders young-adult Caucasian males. As the only mainstream newsstand publication of its genre from 1954 to 1968, *Playboy* averaged 17 monthly depictions of children, crime and violence. Since 1975, the addition of *Penthouse* and *Hustler* increased the newsstand available aggregate to 111 monthly depictions of children, crime and violence. In sum, these magazines paired adult female nudity with images of children, crime and violence, for millions of juvenile and adult readers for over three decades.


## INTRODUCTION

The concept of true democracy presumes both freedom of information and adequate public access to truthful information. In 1832 James Madison[1] argued that an informed public was a prerequisite to educated debate and decision-making on social issues. Public debate regarding the role of pornography in child abuse has already begun. Yet, until the present research, little information on the incidence and nature of child abuse in mainstream erotica/pornography [E/P][2] has been publicly accessible. The purpose of this exploratory research has been to provide the juvenile justice systems and the public with requisite information for informed debate on



children, crime and violence in E/P, and to provide researchers with a solid data base for future research and testing of hypotheses. To this end, this study tested three hypotheses: first, that children have been portrayed both sexually and nonsexually in mainstream E/P magazines; second, that crime and violence have been portrayed both sexually and nonsexually in these same E/P magazines; third, that these images of children, crime and violence have been paired with female nudity and graphic sexual display.

## BACKGROUND

The present exploratory research, funded by the Office of Juvenile Justice and Delinquency Prevention (OJJDP), was designed to provide juvenile justice agencies with an extensive data base on Depictions of Children, Crime and Violence in *Playboy*, *Penthouse*, and *Hustler*. The complete Reisman Report in three volumes, constitutes the definitive report by the Principal Investigator. These three volumes are available separately or together from the Juvenile Justice Clearinghouse in Washington, DC. Volume I (503 pages) is The Overview. This volume incorporates a large body of important project information, including materials contained in Volume II, Methods and Procedures (382 pages) and Volume III, The Data Book (approximately 700 pages). The AUTHENTICATED Reisman Report, delivered in November 1987 to the Office of Juvenile Justice and Delinquency Prevention, incorporates clarifications, corrections and additions to the September 2, 1986 draft delivered by The American University to OJJDP. (A chronology of the project report appears on the overleaf of Volume I, p. iv.)

As the first indepth investigation of *Playboy*, *Penthouse*, and *Hustler*—leaders in the commercial sex industry—this project was the subject of extensive press and public attention. On the one hand, the public has expressed an abhorrence of child pornography and of violence associated with sexuality in sexually explicit magazines.[3] Yet, the most prominent of these magazines publicly denied any misuse of children in its content[4] while certain public officials and individuals otherwise noteworthy as proponents of child welfare attempted to dismiss this research, largely because they were sure children were not misused in these popular magazines.[5]

On the other hand, preliminary research by the Principal Investigator had indicated that children had been extensively sexualized in popular E/P.[6] Furthermore, Juvenile Justice and other professionals identified "softcore" E/P as tools employed to lure and indoctrinate children into sexually abusive situations.[7] Child welfare professionals have also observed that victimized children often continue the cycle of violence, frequently becoming juvenile delinquents and/or adult offenders. Based upon growing concerns regarding the role of E/P in child sexual abuse, and the preliminary

work identifying children, crime and violence in these magazines, an exploratory investigation of the most widely read erotic/pornographic magazines was undertaken. The present research focused upon the analysis of children (juveniles), crime and violence in *Playboy*, *Penthouse*, and *Hustler*, the three most popular "softcore" erotic/pornographic magazines read by both juveniles and adults.

## Why Study Mass Media Communication?

Communication researchers tend to debate particular ways in which specific media messages may affect particular recipients and receivers.[8] Numerous communication models have been designed which attempt to precisely replicate the communication process. Despite subtle differences, communication theorists may be said to agree that any communication process has some effect on receivers:

> [I]n most general terms, communication implies a sender, a channel, a message, a receiver, a relationship between sender and receiver, an effect, [and] a context in which communication occurs.[9]

It follows from the above accepted body of communication theory that E/P messages effect receivers in some manner and thus are worthy of indepth analysis.

## Why Study Playboy, Penthouse and Hustler?

Recent data available from Canada confirmed existing American studies of early onset of exposure to E/P. The Canadians found adolescents, ages 12-17 reporting most frequent exposure to mainstream E/P.[10] Moreover, according to recognized market research sources, *Playboy, Penthouse* and *Hustler* maintain the highest readership amongst all E/P magazines,[11] providing "informal sex education" for juveniles and adults since December 1953, inside and outside the home environment. The overall readership can be said to cross all socio-economic boundaries, while a large percentage of readers may be classified as relatively well-educated upscale "change agents." Based upon circulation figures and juvenile justice and delinquency prevention concerns, *Playboy*, *Penthouse*, and *Hustler* were selected for the present examination of children, crime and violence.

## Why Study the Depiction of Children?

Children have historically been exploited in pornography.[12] Yet, prior to this research, it was generally believed that such exploitation was confined to peripheral, "hardcore" pornography, traditionally found on the fringes of society. Research confirms that hardcore child pornography is nearly always of a sexual nature, and that it constitutes a form of child abuse. The current research effort, however, sought to identify nonsexual and sexual depictions of children as well as depictions of crime and violence in "softcore" or mainstream erotica/pornography.



## Why Study the Depiction of Crime and Violence?

The general public has expressed its concern about the juxtaposition of violence and sex within one medium. For example, in the *Newsweek* Poll by Gallup (March 18, 1985) 73 percent of respondents believed explicit sexual magazines, movies and books lead some people to commit rape or other sexual violence while 93 percent called for stricter control of magazines displaying sexual visual violence. Moreover, the concern about the association of sex and violence is supported by the body of research on media depictions of crime and violence. Here, it is generally conceded that gratuitous depictions of crime and violence have been known to precipitate aggressive behavior.[13] The present investigation: a) established the general context of crime and violence in which child depictions also appeared, and b) captured information on both the nonsexual and sexual depictions of crime and violence in the context of mainstream erotica/pornography.

## Why Study Cartoons?

Approximately two-fifths of the images examined were cartoons. Research confirms that adult readers of E/P magazines commonly rate cartoons as favorite features, while further evidence suggests that juveniles are also drawn to the cartoon feature.[14] The cartoon has its own artistic and historic tradition. By its very nature, the cartoon has a way of overstating, stereotyping and exaggerating its case. Similar to other art forms, the cartoon demonstrates a view of life, of an issue, of an event, or of a people. While appearing as light and guileless humor, the vast body of cartoon research documents cartoons as a sociopolitical art form. It is speculated that some sort of "Socialization of Taboo Ideas" often used the cartoon format to a) circumvent readers' resistance by b) humorously trivializing existing taboos. Based on its historical and popular role in mainstream E/P, an examination of E/P cartoon messages about children, crime, and violence is appropriate.

## Why Study Photographs?

Almost half of the total images examined were photographs. Photographs are generally viewed as accurate fair representations of reality, with little public awareness of the illusions inherent in the photograph.[15] Research identifies such illusion as the result of professional skill and knowledge: The making of the photograph via lighting, camera angles and often composite photography, and its professional reproduction into an artistic product. Upon reception, the child or adult interpretation of the photographic scene takes place, without need for cognitive effort or attention. Since the great majority of E/P pages contain photographic depictions, it is appropriate to examine any widescale circulation of photographic messages pertaining to children, crime and violence.

## METHODOLOGY

1. *Development of Instrumentation*: Utilizing standard content analysis methodology, four discrete instruments were designed, tested and implemented: 1) child cartoons (excluding comic strips), 2) child visuals (illustrations and photographs), 3) crime and violence cartoons (excluding comic strips and child cartoons), and 4) crime and violence visuals (illustrations and photographs, excluding child visuals). The final child cartoon instrument contained 114 variables, child visuals 75, adult crime and violence cartoons 35, and adult crime and violence visuals 49, yielding 273 variables and 12,126 cases.

2. *Coders*: Twenty-two coders over 21 years of age were employed (64 percent female, 36 percent male, 14 percent Black, 86 percent Caucasian, 95 percent college graduates). The project retained a clinical psychologist who held one-hour group sessions each week.

3. *Training*: Coders learned Critical Viewing Skills via great works of art. Following this, content analysis training followed the Krippendorff process. Each coder underwent test trials and group training blocks in the use of the "Coder's Portfolio;" coding instruments, coding manuals and sheets, the Cartoon/Visual Guide, the Emotional Expression Guide (EEG), and the Age Evaluation Guide (AEG).[16]

4. *Materials*: From December 1953 to December 1984, all issues (N=683) were coded for depictions of children: *Playboy* (N=373), *Penthouse* (N=184) and *Hustler* (N=126). Magazines missing in the collection were coded at the Library of Congress. A 42 percent random sample was coded for depictions of cartoon and visual crime and violence.

5. *Magazine Distribution and Instrument Handling*: Coders received a random distribution of magazines in their library carrels, marking instruments with a red pen and personally initialing any changes in analysis. A random selection of two coding sheets per coder per week were checked for accuracy, original coding sheets copied and held in locked metal cabinets for safety while originals were batched and delivered for key punch and data entry to the contracted key punch agency.

6. *Inter-Rater Reliability Measures*: Inter-rater reliability was computed at 0.87 in the pilot study and subsequently, 0.85 for child cartoons, 0.83 for child visuals, 0.81 for crime and violence cartoons, and 0.85 for crime and violence visuals.

## CONCLUSIONS

The present research findings quantify the nature of children, crime and violence imagery in over three decades of *Playboy*, *Penthouse* and *Hustler* magazines. Sexual and nonsexual child depictions and sexual and nonsexual crime and violence depictions were common themes throughout all three magazines. The pairing of these themes over time



with images of adult female nudity and graphic sexual display are pertinent to the current debate on erotica/pornography.

Contrary to popular belief, the depiction of sexual and nonsexual child abuse has not been limited to "hardcore" pornography. It is surprising to many that in 1954 *Playboy* delivered 170 images of crime and/or violence to the public. Total newsstand depictions increased 650 percent across all three magazines by 1984. Looking at children, the *Playboy* only distribution of 17 child images in 1954 were increased—across all three magazines—2,600 percent by 1984. Since May 1954 children have been documented as desiring of and unharmed by adult sexual interactions in these "softcore" magazines. Moreover, the present research found children depicted as viable targets of both sexual and nonsexual physical abuse, documenting a trivialization of child abuse. It is now up to the public and professional communities to document the role of mainstream erotica/pornography in children's lives and child abuse.

An unforeseen finding may be the estimated 27 percent of *Playboy*, 33 percent of *Penthouse* and 47 percent of *Hustler* cartoons and illustrations identified as "Child Magnets." Briefly, Child Magnets are features which are generally unique to the children's world of entertainment (e.g., books and television), and known to attract child readers/viewers. Examples of child magnets are full-color, three-dimensional pop-ups and cutouts, coloring books, paper dolls, Santa Claus, fairy tales, cowboys and indians, Donald Duck and Mickey Mouse, choo-choo trains, etc. Since evidence confirms the large juvenile readership of these magazines, the unique quality of Child Magnets may be viewed as a technique both catering to, and attracting, a juvenile audience. Therefore the depictions presented in "Child Magnets" may be presumed to be of special public interest and concern.[18]

The body of research on sexual arousal suggests that acts of child sexual molestation by some vulnerable juveniles or adults are precipitated if one achieves orgasm via fantasies of sex with children. Similarly, the body of research on media and aggression documents depictions of violence as precipitating aggressive responses in certain vulnerable viewers. Therefore, it appears of compelling public concern that the present research documents a contextual association of three discrete stimuli: 1) adult female nudity and graphic female sexual display, 2) neutral, sexual and violent child depictions, and 3) depictions of crime and violence. The magazine genre evidences a unified culture and world view which incorporates all three stimuli: pairing the arousal to an adult sex object with child sexualization and crime and violence. Thus, it is not unlikely that some vulnerable juvenile and adult receivers may fuse child depictions with arousal to sex (genital stimulus) and/or arousal to violence (aggressive stimulus).

## RECOMMENDATIONS

*Dissemination of Information*

These findings should be provided to public agencies, educators, policymakers, parents and juveniles. Distilled into dispassionate, concrete components (i.e., charts, graphs, statistical tables and explanatory narrative), the information is now ready for public access. Such access means that both adults and juveniles may objectively assess, critique, and debate this issue without requiring exposure to primary sources.

*Education*

Evidence and anecdote confirm extensive juvenile and adult exposure to, and reliance upon, the informal sex education provided by these magazines. Thus, it is only realistic to implement these research data into nonexplicit, nonexploitive school programs as well as other modes of juvenile guidance. The findings should be provided in wholesome educational formats using slide presentations, booklets and videotapes (a preliminary videotape has already been prepared by the Principal Investigator). The use of underage models by the sex industry, the entry of increasing numbers of juveniles into prostitution and the growth of juvenile pregnancy suggest the need for a critical examination of the notions of sexuality which have been and are now presented to youngsters by these informal sex education materials. Use of the suggested educational formats addressing mainstream erotica/pornography could facilitate creative discussion by youth regarding the role of these materials in juvenile sociosexual behavior.

*Training*

Beyond dissemination of the research findings, training in crime site data collection should be conducted. Techniques developed for data collection should be taught on several levels: justice, law enforcement and child protection teams; health professionals such as physicians, nurses, clinicians and counselors; secular and religious educators; parents and juveniles. A data base on the distribution and use of E/P is vital for future policy making. In addition, such data may potentiate revealing lines of questions and may serve as evidence from point of arrest to final case disposition and sentencing.

*Research*

As in most large scale data collection efforts of this nature, due to time restrictions, only a limited amount of analysis was conducted, leaving it to other researchers to more fully explore the policy questions suggested by these data. The voluminous data base provides extensive opportunity for future analyses on mainstream erotica/pornography. The present investigation should facilitate continued and innovative research on erotica/pornography in general and its specific influence upon juveniles in particular. Time series should be conducted across all magazines on all variables. For example, when were child images juxtaposed with violence, sex or crime imagery and



text? Special mention should be made of the potential for change exhibited by these magazines during the duration of the present research project. While under direct scrutiny, there appeared to be a marked change in the treatment of children, crime and violence, particularly in the most popular of these magazines. Thus an ongoing monitoring system should yield valuable changes in the editorial policies of these magazines. Society can no longer avoid recognizing that sophisticated communication technology requires equally sophisticated techniques of analysis.

*Age of Consent*

Finally, based upon the research findings on the use of children, crime and violence in mainstream erotica/pornography, those recommendations proposed by the Attorney General's Commission on Pornography (1986) are all strongly supported. The content analysis of *Playboy*, *Penthouse* and *Hustler* uncovered a steady escalation of graphic depictions from 1954 to 1984 progressing from simple female nudity to those described by the Attorney General in his discussion of obscenity:

> ...child pornography, sado-masochistic scenes, rape scenes, depictions of bestiality or excretory functions, and violent and degrading images of explicit sexual conduct...[19]

Arguments supporting mature age-of-consent parameters for sex industry employees appear to be reasoned and compelling, based as they are on the notion of youthful vulnerability. As the three magazines examined do include substantial displays of the above activities singled out by the Attorney General Meese in his October 23, 1986 press conference, it is proposed that *Playboy*, *Penthouse* and *Hustler* magazines be included in the Commission's recommendation that sex industry models be twenty-one years of age or older. Similarly, publishers should be required to maintain records proving that models are twenty-one years or older.

In addition, a voluntary moratorium of child depictions (in cartoons, illustrations and/or photographs)—by all sex industry publications—is urged until such time that sophisticated research techniques yield adequate data on the harm factor.[20]

## Notes

1. Letter from James Madison to W.T. Barry (August 4, 1832), reprinted in *The Complete Madison 337* (S. Padower ed. 1953).

2. The slash in "erotica/pornography" (E/P) is intended to indicate a separation or a bridge between erotica and pornography. For the definition of E/P in the present research, see Reisman's *Overview of Project* (Volume I), "Working Definition," (p.27). For additional definitions, see "Central Terms" in the Attorney General's Commission on Pornography (1986, pp. 227-232).

3. See for example, *Newsweek* Poll by Gallup (March 18, 1985), wherein 73 percent of respondents believed explicit sexual magazines, movies and

books lead some people to commit rape or other sexual violence while 93 percent called for stricter control of magazines displaying sexual visual violence.

4. See for example, *Playboy* (1985, December): "If other magazines are publishing cartoons of 'gang rapes of children, fathers sexually abusing daughters, benevolent or father figures raping or murdering young girls,' *Playboy* never has, never will" (p.16). For evidence to the contrary, see *Overview of Project* (Volume I), "Appendices A-L."

5. See for example, commentary by Senators (1985, May). In Reisman [Statement], *Oversight [Hearing] of the Office of Juvenile Justice and Delinquency Prevention.* Committee on the Judiciary (Serial No. J-99-23), (pp. 152-175). Said Senator Spector: "This subcommittee has reviewed a great deal of this kind of literature, I have never seen an actual picture of a crime being committed against a child" (p. 64).

6. See Bat Ada (Reisman) and Lederer (1980). Playboy isn't playing: An interview with Judith Bat Ada. In L. Lederer (Ed.) *Take back the night: Women on pornography* (pp. 111-124).

7. For more extensive information see *Overview of Project* (Volume I: Literature Review): "Research on Child Abuse" (pp. 62-67.), and "Research on Erotica/Pornography as an Information Delivery System"; "Research on the Role of Erotica/Pornography Among Children and Adolescents" (pp. 28-30).

8. Ibid. "Research on Mass Media as an Information Delivery System" (pp. 30-38), and "Content Analysis as a Mass Media Research Technique" (pp. 55-58).

9. See McQuail and Windahl (1981). *Communication models for the study of mass communication* (pp. 3-4).

10. See the *Attorney General's Commission on Pornography,* (1986, July), p. 916. Also see Hass' research *Teenage Sexuality: A Survey of Teenage Sexual Behavior* (1979). In chapter 12, "Teenagers' Responses to Pornography" (pp.153-161), teenagers discuss the influences of erotica/pornography (particularly *Playboy* ) in their personal and sexual lives.

11. For more extensive information see *Overview of Project* (Volume I: Literature Review): "Research on Erotica/Pornography as an Information Delivery System" (pp. 22-29), and "Market Research on *Playboy, Penthouse* and *Hustler"* (pp. 59-61).

12. Ibid. "Research on Child Abuse" (pp. 62-67), and "Research on the role of erotica/pornography among children and adolescents" (pp. 28-30).

13. Ibid. Reference is made to crime and violence in "Research on Erotica/Pornography as an Information Delivery System" (pp. 22-30), "Research on children, television and aggression" (pp. 32-38), and "Content Analysis as a Mass Media Research Technique" (pp. 55-58), and "Research on Child Abuse" (pp. 62-67).

14. Ibid. "Research on Cartoons and Humor as an Information Delivery System" (pp. 39-44).

15. Ibid. "Research on Photographs as an Information Delivery System" (pp. 45-54).

16. For extensive information see Reisman's *Methods and Procedures* (Volume II). In addition, the "Research Parameters and Limitations (RPL)" are located in *Overview of Project* (Volume I, pp. 68-117).



17. For extensive data presentations, see Reisman's *Data Book* (Volume III). A compendious overview of Selected Findings and Discussion of Findings are located in *Overview of Project* (Volume I, pp. 118-162). In addition, the seven preliminary studies conducted during the present research project are discussed in (Volume I, pp. 163-185).

18. For additional information on the Child Magnet sutdy, see *Overview of Project* (Volume I: Preliminary Studies), "Child Magnets," (pp. 163-169).

19. This quote is from the *Washington Post* article "Meese forms anti-pornography task force" by H. Kurtz (October 23, 1986, p. A21).

20. The concept of a voluntary moritorium was raised by the Principal Investigator in the testimony delivered to The United States Attorney General's Commission on Pornography, Miami (November, 1985).

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# A BRIEF ANALYSIS OF THIRTY-SIX CHILD SAMPLE CARTOONS AND PHOTOGRAPHS FROM PLAYBOY, PENTHOUSE AND HUSTLER

Whatever happened to childhood? The above *Washingtonian* cover portrays two five- to six-year-old children, apparently siblings.

perusing *Playboy* magazine. This picture may be seen as a dramatization of actual data which identify *Playboy, Penthouse,* and *Hustler* magazines as primary sources of sexual education, entertainment, stimulation and guidance for child and adult consumers. Our research considered these magazines with due regard for their widespread, long-term use as sex education by children as well as adults. Small children (and some adults) are often unable to read, and thus attend to pictures more than to captions. With this in mind, project analysts (coders) were trained to mask off captions before determining the pictured children's ages. Until "caption masking" was standardized, the age-inappropriate nature of much child text and imagery commonly caused coders to inflate children's ages by more than five years (e.g. judging a four-year-old as nine-years, etc). It is similarly urged that readers mask the captions of the attached 36 sample images to assess child ages. (To guide objective analysis we developed the Age Evaluation Guide presented in Volume II of the final "Reisman Report.") Remember, it can be said that images are more speedily received and longer retained by the brain than is text.

The Principal Investigator's analysis reflects a) Ph.D. in Speech Communication from Case Western Reserve University with a specialty in mass media effects, b) expertise as a multi-media art educator for the Cleveland Museum of Art, the Milwaukee Public Museum, the Los Angeles Skirball Museum, and *Scholastics Magazine,* New York, and c) an award-winning professional career creating educational "music videos" for both public and commercial television.

Space limited this analysis to children and drugs. See The Institute for Media Education (TIME) for a portfolio of sample crime and violence cartoons and visuals in the three magazines.

## I. PLAYBOY "DRUG EDUCATION"* CARTOONS

*Education: Cultivation and training, as of the mind; the acquisition or imparting of knowledge...mental training along a certain line.*

1) Grandmother Enjoys Marijuana (9/72, p.195). A hip grandmother enjoys the modern amenities of marijuana suggesting both the hominess and the harmlessness of drugs for juvenile and adult readers.

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*NOTE: COVER THE CAPTION FIRST. NEXT, READ TEXT AND DETERMINE THE AGE OF CHILDREN IN CARTOON. Based upon a found perceptual/behavioral bias toward inflating children's ages in cartoons due to precocious captioned language, it is crucial to cover captions for a more accurate assessment of children's chronological ages.



2) Young Children Enjoy Marijuana (12/70, p. 296).* Two small brothers, about ten years of age, link the joys of Christmas with marijuana use, suggesting both the hominess and the harmlessness of drugs for juvenile and adult readers.

3) Women Enjoy Illicit Drugs (6/77, p. 201). Women describe use of cocaine and other illicit drugs as an integral part of party entertainment, suggesting the advantages of "recreational" drug use for both juvenile and adult readers.

4) Parents Enjoy Marijuana (3/70, p.221). Parents and other "elders" learn to enjoy youthful drugs, suggesting both their hominess and the harmlessness for juvenile and adult readers.

The four cartoons in this set are themes representative of the data on child and drug images in *Playboy,* as well as those in *Penthouse* and *Hustler* (see the "Reisman Report" Volume III). Hundreds of cartoons, fiction and editorials educate readers to the notion that child and adult drug users are adventurous risk-takers who do no harm to self or society. Documentation of *Playboy's* funding and legislative lobbying role for NORML (National Organization for the Reform of Marijuana Laws) and for the decriminalization and acceptance of all illicit drugs in the USA, is available through The Institute for Media Education (TIME).

## II. PLAYBOY CHILD "SEX EDUCATION" CARTOONS

5) Implied Incest (3/72, p.163). The "Teddy" cartoon is a full page color image describing a sexual scene between a female child and a male adult. The story takes place in mid-day (based upon the light violet of the window scene) and in a middle to upper class home (based upon the dormer window, well kept furnishings, violet wall-to-wall carpeting, clear possession of room by the lone child, etc.) The artist, Ffolkes, typically draws this child in his cartoons: a girl of about seven to eight years, large wide eyes which occupy nearly half of the face, an unformed nose and cupid bow mouth. But for the exaggerated breast development, her polka-dot hair bow and yellow curls complete an unambiguous pre-school look. Since the exaggerated breasts deliberately confuse the reader's age evaluation, place your finger over the budding breast to determine the holistic age information provided. Ffolkes creates the overall impression of a very young child by simultaneously linking breasts with a child-like face and general body, a flowery illustrative technique, a doll house, teddy bear and ball.

The story is of child sex for money (prostitution). Cartoonist Ffolkes has the child cheerily blame her "teddy" for the unexpected price, portraying the youngster as mercenary and more clever than the

adult male offender. Thus, Ffolkes "equalizes" the child and adult in his drama, suggesting that the male, not the child, may be victimized, tricked and exploited. In addition, the casual safety of the man's mid-day entry into the bedroom of the already nude female child and his shock at a charge (blamed on "teddy"), would imply some sort of kinship pattern; father, uncle or step-dad, etc. Some may question the incest implication or prefer to see this as an adult prostitute dressing as a child, an equally problematic "joke". However, a complete review of Ffolkes's 35 child cartoons presents an identifiable artistic pattern of nude female children in bed with men, women and other adult family members (e.g. "Uncle William"). Furthermore, as *Playboy* has become aware of the Reisman research activity, Ffolkes has lately abandoned these child-adult sex dramas for other themes.

It is relevant that the male's appearance, his age, race, white collar and blue surge suit, identify him as a similar profile to millions of *Playboy* readers. This child molestation drama suggests intercourse may occur and is part of a documented *Playboy* claim of adult-child sex harmlessness.

Reality is in contrast to the Ffolkes humor mythology. For, should a child of this age be penetrated by the sex organ of such an adult male, the child would commonly sustain significant, often permanent, physical (as well as emotional) trauma. Here, as throughout hundreds of similar "jokes," children are seen as sex objects for some normal and pedophile juvenile and adult readers.

6)Uncle/Incest (5/74, p. 205). As in "Teddy", Ffolkes again uses a young child (adding a bow, curls and exaggerated breasts) for an incest/trickery/statutory rape story. Ffolkes has the child describe an apparent statutory rape by her overweight, elderly, uncle as a fun game. Typical of most *Playboy* child sex abuse humor is the adult use of "games" to trick children into first degree sex assault with no physical or emotional harm resulting to the child.

7) Sexual Molestation (10/71, p. 166). Note, Interlandi's seven- to ten-year-old child appears older than does Ffolkes's youngsters (sans Ffolkes's exaggerated breasts). Interlandi insinuates that his female child is experienced with hands-on sexual molestation, for we are told she is comparing this attack with those past. As in the "Teddy" cartoon, the male offender (a tossled, now robed, neighbor, teacher, uncle, friend, etc., lighting his "after" cigarette), is the more innocent of the two characters. This *Playboy* sex education cartoon claims the sexually savvy nature of the child who, as always, is not physically or emotionally harmed by a man's suggested full sexual assault.

8) Gang Rape by Adult Friends/Beast/Objects (3/78, p. 231).



Again Ffolkes uses the culture of childhood to set his scene. He places his exaggerated breasts, bow and curls upon a "Dorothy" likely raped by all three cheery Wizard of Oz friends. An immobile policeman stands by providing no movement toward chase or arrest. This particular sex and violence child assault joke is rare for *Playboy* as it includes some suggestion of harm (although humorous) and sexual force (versus trickery) of the child.

## III: PENTHOUSE CHILD "SEX EDUCATION" CARTOONS

9) Child Assault (11/76, p. 92) "Straight" sex between an apparent adult and a five- or six-year-old is not seen as "deviant." The *Penthouse* sex education cartoon implies the child as mature, mercenary, promiscuous and unharmed by sexual intercourse.

10) Prostitution/Homosexual/Orgy (2/79, p.60). *Penthouse* proposes, as above, the precociously natural prostitution of children, suggesting orgy/homosexual activity with adults as harmless and funny. This child is seen to be about three to five years of age.

11) Statutory Rape by Object (5/84, p. 137). The use of fairy tales by pornographers is discussed in greater detail in the "Reisman Report" Volume I. Here Dorothy was depicted grinning, voluntarily grasping the Straw Man with her arms and legs, while her two protectors casually observe the activity. Again, the idea of "adult" and bizarre sex as harmless to the child is the sex education presented.

12) Child Assault (11/82, p.171). Artist Bill Lee applies the Ffolkes technique: very small child with exaggerated breasts. The nude "conservative politician" in bed with the nude child suggests sex has pleasantly taken place. As with "Uncle William," (and Interlandi) the child places a happy phone call to mom while the man smokes his "after" cigarette. Harmlessness of adults tricking children into sex is the sex education presented.

## IV: HUSTLER CHILD "SEX EDUCATION" CARTOONS

13)Incest/Father Assault (5/84, p. 15). Artist Dwaine Tinsley has a father attack his teen-age daughter. She appears frightened but resigned. Some emotional harm of sexual violence is implied, though apparently disregarded by Tinsley's father character.

14) Abortion (2/79, p.85). One of dozens of similar *Hustler* abortion "jokes." Hundreds of "birth" jokes in all three magazines describe the genre's systematic portrayal of birth as producing generally illegitimate, deformed, and/or undesirable offspring.

15) Sexual Assault in Children's Public Space (3/77). This Tinsley story provides "Chester the Molester" (a monthly feature) with a playground victim. Noting the smiling face of the potential victim and the unusual way in which the child's legs are opened as she goes toward Chester, Tinsley suggests here that children may seek, but surely are unharmed by such sexual assaults. Children's assault by fathers/neighbors/uncles/Santas/politicians/ministers/fairy tale friends, in the child's private space (home) and /or public space (e.g. playground) is common in all three magazines. All three describe children as sexual "targets" with neither a safe place nor an adult person (male) they may expect to trust.

16) Kidnapping Children (10/77). *Hustler* generally builds stories around the kidnapping of small girls in the monthly Chester activities. These bound children appear apprehensive and "Chester the Molester" is naked. Tinsley specializes in portraying fearful faces on his children and his later cartoons often used much more graphic sexual scenes than this in 1977. However, the children here are treated with as little concern for the harm of adult sex assault as are the *Playboy* Ffolkes smiling children.

## V: SANTA CLAUS (RELIGION) IN PLAYBOY AND PENTHOUSE CARTOON HUMOR*

17) Cannibalism of Boy (1/77, p.221). Here *Playboy's* Santa appears to have cannibalized a boy whose clothing is piled on the floor at right. Santa's pointy, sharpened teeth and bloody handkerchief clearly indicate the child was "dinner." A separate study of the treatment of religion and Santa, in all three magazines, identified the treatment of these themes as systematically violent and deviant. (Preliminary findings on this study are available from TIME).

18) Bestiality (1/79, p.360). *Bestiality between wives and the family dog, etc., is a common *Playboy* theme and reported in the findings under "crime." It is noteworthy however, that one of the few *Playboy* male characters to be portrayed in bestiality is Santa Claus. The significance of such images—particularly including Santa—for millions of children, voluntarily and involuntarily, viewing these magazines cannot be overstated.

*NOTE: This "childless" Santa cartoon (#18) is presented as a point of information due to Santa's emotional/spiritual role in most children's lives. Additional Santa analyses are available through the institute (TIME).



19) Sadistic Sexual Assault (12/74, p.87). Here the small girl in *Penthouse* is portrayed as pained, and the lyric supports the notion that a rape is taking place. Upon closer inspection we find that while Santa's pants are down, the pants are still ON the child. "Public" adult-child sex and violence (rape) is the suggested entertainment and sex education theme. See Drs. Wambolt and Negley's commentary on this cartoon and 17 other images appendixed to Volume I of the "Reisman Report."

20) Child Murder (12/77, p. 208). Killing of boys is portrayed as humorous in this bloody *Penthouse* image of a "good boy" shot by Santa. The genre regularly uses Christmas and Santa as its holy or spiritual reference. Hence, it is important to note that all three magazines portray Santa consistently as an immoral, violating or violated male.

## VI: PLAYBOY CHILD "SEX EDUCATION" PHOTOGRAPHS

21) Nude adolescent and "Rubber Ducky" (7/85, p.133). Following the announcement of this research, although loudly denying their history of child sex abusive imagery, *Playboy* and *Penthouse* drastically reduced the numbers and nature of their sexually assaultive images of children. This 1985 photograph was part of the genre's many subtle attempts to retain the child in sexual scenes. The yellow duck (called her "rubber ducky") in this model's hand, the oversized red high-heeled shoes (taken from mommie's closet?), the knock-kneed long, adolescent legs and narrow hip line, white stockings with yellow duckies, and the suggestive text, testify to *Playboy's* attempt to circumvent the juvenile and adult pedophile and normal reader's resistance to sexualized images of children, stimulating readers with "child" arousal stimuli.

22) Incest/Father/Rape (11/71, p.120). This incestuous photograph has been assessed by computer air-brush experts as a cut-and-paste image of both an adult female and a young child, air-brushed together to arouse the reader by the child imagery. The pig-tails and hair bows, Raggedy Ann, white bobby-sox and Mickey Mouse/nursery rhyme sheets, are clear symbols to simulate the child. Moreover, the call to the reader/fathers to force sex on their sleeping daughters is blatant in this *Playboy* text (e.g., "Naturally, she digs forceful father figures, so come on strong, Big Daddy!"). Again, as in the cartooned sex/violence images of *Playboy*, there is no suggested harm (physical or emotional) to the alleged child from such a "forceful father figure." The double entendre of "come" on strong, urges fathers/readers to use violence for full sex entry.

23) Incest/Rape (8/75, advertisement). This image of a developing adolescent—apparently handcuffed for giving trouble to parents—is especially meaningful due to the real life cases of such young women and girls who have been tied to beds by parents or guardians and forced to perform sexually. It is especially useful to note that this photo is an advertisement for *Playboy's* once "harder" magazine, *Oui*, which used even stronger child and violent sex educative material than did *Playboy*. The incestuous and sadistic information links sex and violence and again suggests that the young girl (Jane) is getting what she deserves, with pleasure for all.

24) Simulated Lesbian/Incest (7/81, p. 108). Photographer David Hamilton provides *Playboy* with "private" scenes of (foreign) nude, young girls whom he portrays as "cousins," embracing and displaying themselves for the reader's entertainment. Publicly displayed images of these youngsters (unsubstantiated as either cousins or lesbians) is not presented as possibly harmful for the girl models now or later, when they gain their age of majority.

25) Incest/Rape of "Retarded Nymphette" (11/76, p. 147). As in cartoons, *Playboy* photos have generally utilized "themes" to exploit child nudity. "Sex in Cinema" has been a theme which permitted *Playboy* to "report" explicit pictures of nude children in foreign films and/or sexually graphic but unscreened outcuts from American films. This photo uncritically and glibly describes a "retarded nymphette" about to be "ravished" by her "father" figure.

26) Incest/Father-Daughter (11/80). Using a now famous actor/director and a well known child star, this film outcut portrays a father apparently about to perform oral sex on his young daughter. Again, *Playboy's* text artfully suggests that incest is harmless for a father or his child.

27) Adolescent and Simulated Lesbian (8/71). This typical Hamilton photo-essay "peeps" at (foreign) young girls during the "growth" stage. Hamilton poses the girls as self-exploring and lesbian. Despite the documented abuse of nude models (from obscene phone calls to violent rape-murder), the harmless, artistic nature of posing is emphasized and no possibility of present or future harm to the young girls from sex display is presented.

28) Teen Nude (8/78, p. 238). Relying upon the sexually mature appearance of the youngster to legitimize the (now illegal) sexual exploitation of an underage youth, *Playboy* knowingly used this nude photo of Natassja Kinski at 17 years of age. The use of voluntarily nude young "actresses" further undermines the sensitivity of readers regarding the capability of young persons, such as 15-year-old *Penthouse* pet Tracy Lords (9/84), to give consent to their irreversible appearance in public sex displays. The Attorney General's pending legislation will require a 21-year-age-of-consent cap for nude/sex models. Not surprisingly, the cap is opposed by the sex industry.



29) "Pseudo-Child" (4/76, cover). Fantasizing child sex for the reader, *Playboy* dresses the explicit, sexually seductive, half-nude adult in a white virginal petticoat, black patent Mary Jane shoes and white tights, finishing with a little-girl blond hair-do. She sits on a white bedroom rocker, encircled by child symbols in her pink, blue and white wallpapered bedroom. Clutching her (surrogate *Playboy* reader) white "bunny" to her full breast and surrounded by her small crushable, vulnerable pastel-colored dolls and stuffed animals, she gazes out at the reader with a little-girl, "come-hither" pout. Similar semi-nude child-adults are now regular features in sexually explicit magazines, films and videos. (Note that this April 1967 *Playboy* is the magazine our two little children are examining on the *Washingtonian* cover.)

Several medical and photo-montage experts examined this cover. Each independently concluded that two, perhaps three bodies were combined to create this cut-and-paste female image. The child clothing and props were all carefully designed to create child arousal stimuli by blurring perceptual distinctions between child and adult females. As in cartoons, technically deceptive photos suggest to both normal and pedophile juvenile and adult readers that the child is a woman and the woman is a child and thus both children and woman may be envisioned as appropriate sexual objects.

30) "Peeping" (11/71, p.174). An ostensibly natural, "private" scene of two nude youths in love provides public entertainment for *Playboy* viewers. This may be said to undermine the sensitivity of readers regarding the right of children to attain their majority before giving consent to sex displays. These two youngsters are seen as under 18. The 21-year-age-of-consent is meant to provide youth with an opportunity to mature prior to being legally acceptable as at-risk nude sex objects. That is, such models serve, irreversibly, as a stimulus to the imaginations and possible behaviors of some portion of the public large.

## VII: PENTHOUSE CHILD "SEX EDUCATION" PHOTOGRAPHS

31) A 12-Year-Old Sex Object (1/76, p.54). This explicit *Penthouse* display included graphic genital and anal exposure of an apparent 12-year-old child. For several months following this photo-story, *Penthouse* conducted a "guessing game" with prizes for readers who guessed the "real" age of "Baby Breeze." Eventually the publisher claimed the English "Baby" to be 21 years old (unsubstantiated), further blurring perceptual distinctions between child and adult females as appropriate sexual objects for both normal and pedophile juvenile and adult readers.

32) A Six-Year-Old Sex Object (1/81, p.133). This *Penthouse* model's face alone (as it appeared in the opening photo of this photo-essay) was shown to doctors attending Dr. Reisman's seminar for pediatricians at Georgetown University Hospital. From the model's face, the pediatricians judged her to be six years of age. As this photo-essay continued, the "child" attained breasts and became a "woman," and graphic genital exposure and images of "fantasy" violence were added. The repeated magazine genre theme both in cartoons and later in photos has been a blurring of distinctions between child and adult females as appropriate sexual objects for both normal and pedophile juvenile and adult readers.

## VIII: HUSTLER CHILD "SEX EDUCATION" PHOTOGRAPHS

33) Incest/Child Molestation (1/76, p. 82). Arguably, the small boy has been manually stimulated to erection for this illegal, "spontaneous" photo essay, implying the harmlessness of mother and son sex.

34) Child Assault (2/75, p. 68). This extensive photo essay pictures a nude young girl with a clothed middle-aged man. The youngster has not attained pubic hair as yet, or it has been removed to suggest a much younger child.*

35) Scout Display (10/76). *Hustler* often dresses their child or adult sex models in Brownie, Girl Scout, Camp Fire Girl, Candy Stripe uniforms, etc., in photo-essays. Based upon general research conducted on "paired stimuli" (See discussion in Volume I of the "Reisman Report"), genital/anal displays of nude young models dressed in children's uniforms would place some such uniformed children at increased risk of assault from associationally stimulated normal and pedophile juvenile and adult readers.

36) Child Sex Display (8/83). The "little girl" is displayed genitally and anally. Allegedly an adult, the text claims, "You would be surprised what a 'little girl can do...'" As always, these phtots systematically blur the social, physical, and emotional distinctions between female children and adults as appropriate sexual targets for normal and pedophile juvenile and adult readers. This photo repeats the same sex educative cartoon information discussed earlier, suggesting that adult-child sex/violence is fun and harmless physically and emotionally for even the youngest of children.

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*NOTE: Child Surrogates: the increased use of shaved female genitalia in all three magazines continues to simulate children as sex objects for the stimulation of both normal and pedophile juvenile and adult readers.

The following 36 cartoons and photos are numbered as per foregoing discriptions.



THE 36 CARTOONS AND PHOTOS

HAVE BEEN OMITTED.

# SELECTED FINDINGS

## Child Depictions

### Basic Facts:

49% (2,971) photographs
34% (2,016) cartoons
17% (1,017) illustrations

| PRINCIPAL CHILD | AND | OTHER CHARACTER *Where Depicted* |
|---|---|---|
| 47% female | | 49% male |
| 32% male | *SEX* | 35% female |
| 21% both/other | | 16% both/other |
| | | |
| 39% 3-11 years | | 78% adults |
| 26% 12-17 years | | 7% 3-11 years |
| 16% fetus-2 years | *AGE* | 7% 12-17 years |
| 14% pseudo children (*) | | 6% unspecified |
| 5% unspecified | | 2% fetus-2 years |
| | | |
| 85% Caucasian | | 85% Caucasian |
| 3% Black | *RACE* | 3% Black |
| 12% Other minority | | 12% Other minority |

### Sample Child Depictions (Nonadditive)

29% nude/genital display (visuals only)
21% visually exposed/sexualized
20% genital activity
16% sexual encounter with adult
10% force
10% killing/murder/maiming
6% internal genital ("pink") exposure (visuals only coded)
4% sex with animals/objects

### Share of Child Depictions by Magazine**

*Playboy*: 8 avg/issue (5% of *Playboy* cartoons/visuals)
*Penthouse*: 6 avg/issue (4% of *Penthouse* cartoons/visuals)
*Hustler*: 14 avg/issue (12% of *Hustler* cartoons/visuals)
*Playboy* highest year: 1971 (N=187, or 16 per issue)
*Penthouse* highest year: 1972 (N=131, or 11 per issue)
*Hustler* highest year: 1978 (N=228, or 19 per issue)

Over 9,000 scenarios in *Playboy, Penthouse* and *Hustler* were identified as depicting characters under 18 years of age. From this population pool, a mere 6,004 scenarios met the project's unusually narrow criteria for the analysis of child depictions.[17]



## Adult Crime and Violence Depictions

### Basic Facts:***

42% (6,273) photographs
36% (5,338) cartoons
22% (3,243) illustrations

| VICTIM | AND | OFFENDER *Where depicted* |
|---|---|---|
| 46% male | | 54% male |
| 43% female | *SEX* | 22% female |
| 11% both/other | | 24% both/other |
| | | |
| 66% 18-39 years | | 57% 18-39 years |
| 15% 40-60 years | | 17% 40-60 years |
| 3% 61 + years | *AGE* | 3% 61 + years |
| 16% unspec/mixed | | 23% unspec/mixed |
| | | |
| 85% Caucasian | | 82% Caucasian |
| 2% Black | *RACE* | 2% Black |
| 13% Other minority | | 16% Other minority |

### Sample Crime and Violence Depictions: (Nonadditive)

56% violent props (Visuals only)
32% nude and/or sexualized victims
14% killing/murder
14% assault/battery
12% sex dealing/prostitution
12% violent sex act
12% other violent activity
11% white collar crime

### Share of Crime and Violence Depictions by Magazine:

*Playboy*: 21 avg/issue (12% of cartoons/visuals)
*Penthouse*: 16 avg/issue (10% of cartoons/visuals)
*Hustler*: 32 avg/issue (26% of cartoons/visuals)
*Playboy* highest year: 1976 (N=490, or 41 per issue)
*Penthouse* highest year: 1980 (N=271, or 23 per issue)
*Hustler* highest year: 1984 (N=568, or 47 per issue)

## AGGREGATE SHARE OF CHILDREN, CRIME AND VIOLENCE BY MAGAZINE

*Playboy*: 29 average per issue
*Penthouse*: 22 average per issue
*Hustler*: 46 average per issue

* The description of "pseudo-child" provided in the Attorney General's Commission on Pornography (1986, Vol. I, p. 618) reads: "Pseudo-child pornography or 'teasers' involve women allegedly over the age of eighteen who are 'presented in such a way as to make them appear to be children or youths.' Models used in such publications are chosen for their youthful appearance (e.g., in females, slim build and small breast); and are presented with various accountrements designed to enhance the illusion of immaturity (e.g., hair in ponytails or ringlets, toys, teddy bears, etc.). 'Pseudo-child pornography' is of concern since it may appeal to the same tastes and may evoke responses similar or identical to those elicited by true child pornography."

** For rationale of estimates, see *Overview of Project* (Volume I), Table I, "Average Total Number of Features Per Magazine," and Table II, "Average Number of Cartoons and Visuals Per Issue Containing Child Imagery" (pp. 95-96).

*** For rationale of final 14,854 estimate, (originally 14,692) see *Overview Project* (Volume I), Table I, "Average Total Number of Features Per Magazine" (p. 95), and Tables "Crime and Violence Data" (p. 133), "Crime and Violence Cartoon Data" (p. 134), and "Crime and Violence Visual Data" (p. 137).

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NATIONAL CENTER FOR MISSING & EXPLOITED CHILDREN

MARCH 24, 1988

Judith A. Reisman, Ph.D.
President
The Institute for Media Education
P.O. Box 7404
Arlington, VA 22207

Dear Judy:

Many, many thanks for honoring our request and providing at no cost the hundreds of copies of the "Executive Summary: IMAGES OF CHILDREN, CRIME AND VIOLENCE IN PLAYBOY, PENTHOUSE AND HUSTLER MAGAZINES" and for sending them to our mailing lists of criminal investigators working cases of missing and sexually exploited children.

I have carefully studied the Executive Summary and strongly urge all those concerned with the welfare of children to thoroughly review the document and give heed to the many disturbing implications contained therein for the protection of children.

This study must be read by all those concerned with the ways pornography and violence in the media affect the incidence of child sexual exploitation and abuse. In support of this thought, you may like to know some of my professional background and investigational findings.

Prior to my coming to the National Center as its Deputy Director, I was the Program Manager for the Louisville-Jefferson County KY Exploited & Missing Child Unit. This police/social work Team was the first in the nation created to provide detection, investigation, and protective services on behalf of youth as well as apprehension and prosecutory services against adults criminally exploiting children through prostitution, pornography, or child sex rings in the Louisville SMSA.

From July, 1980, through February 1984, the police/social work Team of the E.M.C.U. investigated about 1,400 cases of children suspected of being victims of sexual exploitation. 54% (756) of the children were found to be victims and an addtional 31% (431) of the children were considered probable victims although lacking sufficient proof for court proceedings.

During this time period, the E.M.C.U. prosecuted hundreds of adults for various crimes involving the sexual exploitation of children. Over 40 major cases involved the successful prosecution of adults involved with over 12 children each. In one particular case, investigators thought there were

up to 320 child victims. At the time of arrest of and/or service of search warrants, ALL of these adult predators were found with various forms of adult pornography and in most cases child nudes and/or child pornography. Over 4 years, the E.M.C.U. Team learned to expect to always find adult pornography as such was used by the adult offenders for their own sexual arousal, for self validation of their own sexual deviation(s), for extortion of child victims or other adults, and for the deliberate and planned lowering of inhibitions of child victims.

Truly, the media you have identified can be devastating in affect in protecting children and gives real cause for concern and study when child erotica seems to be on the increase in popular literature. Please keep in touch with all current updates and new initiatives.

Again, many thanks for the multiple copies of the report and all your efforts on behalf of children.

Cordially,

/S/ John

John B. Rabun, Jr., .ACSW
Deputy Director
Technical Assistance

# Memorandum

Subject

18 U.S.C. Sec. 2251 - 2252

To OJJDP Division Managers
Roberta Dorn
Mary Witten Neal

Date

22 APR 1988

From Verne L. Speirs
Administrator, OJJDP

Please be advised that I have received a memorandum from Charles A. Lauer, General Counsel, regarding the report "Images of Children, Crime and Violence in Playboy, Penthouse and Hustler Magazines, Executive Summary" that was recently received in the Office.

Please review the following relevant portions of the memo from the Office of General Counsel and notify all of your staff immediately:

> "18 U.S.C. Sec. 2251-2252 provides criminal penalties for certain acts involving the sexual exploitation of children.

In connection with Judith Reisman's Report, staff should be cautioned that the knowing receipt or distribution of certain visual depictions (if the depictions are of minors engaged in sexually explicit conduct) contained in the Report or the reproduction of these visual depictions for distribution through the mail, as provided in Sec. 2252(a)(1) and (2), may subject the individual to the criminal penalties provided in Sec. 2252(b).

Please advise all staff that the report should not be duplicated or sent through the mail."

cc: Charlie Lauer
Diane Munson
Sharon Wagner
Joe Ellis
Kay McKinney
Buddy Howell

MOTION FILED
JUL 21 1988

No. 87-1651

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1988

COMMONWEALTH OF MASSACHUSETTS,

*Petitioner,*

v.

DOUGLAS L. OAKES,

*Respondent.*

ON WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF THE COMMONWEALTH OF MASSACHUSETTS

## MOTION FOR LEAVE TO FILE A BRIEF *AMICI CURIAE* AND BRIEF OF COVENANT HOUSE AND THE NATIONAL CENTER FOR MISSING AND EXPLOITED CHILDREN, *AMICI CURIAE*

GREGORY A. LOKEN*
Institute for Youth Advocacy
Covenant House
460 W. 41st Street
New York, New York 10036
(212) 613-0349

DAVID W. LLOYD
National Center for Missing
and Exploited Children
1835 K Street, N.W., Suite 700
Washington, D.C. 20006
(202) 634-9821

*Counsel of Record

*Counsel for Movants-Amici Curiae*

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## MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* AND BRIEF *AMICI CURIAE*

Covenant House and the National Center for Missing and Exploited Children hereby respectfully move for leave to file the attached brief *amici curiae* in support of the Commonwealth of Massachusetts in this case. The consent of the attorney for the petitioner has been obtained. The consent of the attorney for the Respondent was requested, but no response was received.

### Interest of *Amici*

Covenant House is a New York not-for-profit organization dedicated to providing crisis care and longer-term help to homeless and runaway children. With "open-intake" crisis centers located in New York, Houston, Fort Lauderdale,

New Orleans, and Toronto, Covenant House now serves over 20,000 such children annually in North America. (Since 1980 Covenant House has served abandoned and homeless children in Central America as well, with current programs in Guatemala, Panama, and Honduras.) Typically aged 12 to 20, most of these children have spent long stretches of their lives battling for survival on city streets, with prostitution, drugs, and petty crime dominating their lives, and often their souls. In the last two years Covenant House has launched a national toll-free hotline, the "NINELINE"—available to homeless, runaway, other troubled youth and their families—and several major outreach programs, using mobile vans and counsellors on foot, to seek out children living on the street.

Because of this close involvement with "street kids," Covenant House came early to the fight against child sexual exploitation, supporting legal action against juvenile prostitution and child pornography throughout the last fifteen years. Covenant House filed two briefs *amicus curiae* in *New York* v. *Ferber*, 458 U.S. 747 (1982), and founded the Institute for Youth Advocacy in that year, with one of its purposes being a continued struggle to protect children from sexual exploitation through every available legal means. The Institute played an important role in the drafting and passage of the Child Protection Act of 1984, 18 U.S.C. §§2251-2254, 2256, and the Child Abuse Victims Rights Act of 1986, 18 U.S.C. §2255, which together represent a powerful federal commitment to stop the traffic in child pornography. Covenant House continually seeks to educate the public about the dangers of all types of sexual abuse and exploitation of children, and more importantly, to care for those already so misused. Half or more of the children and teenagers who come to Covenant House programs each year have been sexually exploited at home or on the street prior to their arrival; most have little prospect of healthy futures without dramatic personal, educational, and economic intervention.



The National Center for Missing and Exploited Children (the "Center") is a nonprofit, tax-exempt corporation chartered in the District of Columbia in 1984, with the goals of decreasing the incidence of crimes against children, effecting positive changes in public law and policy and encouraging an awareness of the significance of all crimes against children, and assisting families and those who seek to protect children.

The Center has been funded by the Office of Juvenile Justice and Delinquency Prevention since 1984 to implement three tasks under the Missing Children's Assistance Act (Public Law 98-473; 42 U.S.C. §§5771-5777) to operate the national toll-free hotline for reports of missing children; to operate the national resource center and clearinghouse for prevention, investigation, prosecution, and treatment of the missing and exploited child case; and to assist OJJDP in performing its task of coordinating federally funded programs relating to missing children. The Center actively assists federal and state law enforcement agencies' efforts to reduce the incidence of sexual exploitation, including passing reports of child pornography received on the hotline to agents of the U.S. Customs Service and local police departments for investigation. The Center provides information on specific federal and state statutes and legislation affecting children, including child pornography laws, to 39 state missing children clearinghouses, 130 nonprofit organizations, and interested child advocates, and training to professionals on investigation and prosecution of child pornography.

The Center has disseminated more than 1.7 million free copies of the eight books and 11 brochures it has developed, including four specifically devoted to child sexual victimization: *Child Pornography and Prostitution: Background and Legal Analysis* (produced in cooperation with Covenant House, among others), *Children Traumatized in Sex Rings*, *Interviewing Child Victims of Sexual Molestation*, and *Child Molesters: A Behavioral Analysis*. The Center's

*Selected State Legislation* identifies model legislation related to children, including laws against sexual exploitation.

Because of their strong, and complementary, commitments to protecting children, Covenant House and the Center may provide perspectives on the issues in this case that the parties—prosecution and defense alike—cannot. Both organizations take as the starting point of their analysis of the issues here not the desirability of punishing a specific offender, but the interests and the vulnerability of thousands of children. Protecting those children in all of the fifty states will depend, in part, on maintaining clarity and common sense in First Amendment analysis of child pornography statutes. Covenant House and the Center therefore respectfully ask that their views be heard in the case, but more importantly that the muddled decision of the Massachusetts Supreme Judicial Court be reversed.

Respectfully submitted,

Gregory A. Loken
*Attorney of Record*
*for Movants/Amici Curiae*



## Question Presented

Is a state statute "overbroad", and void on its face under the First Amendment, if it prohibits the solicitation of children to "pose" or be "exhibited" in a state of nudity for a photograph, when such prohibition is part of a general statutory scheme to ban the production of child pornography, and when the highest state court failed to explain why no narrowing construction of the statute is possible?

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## BRIEF *AMICI CURIAE*

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### Statement of Interest

As more fully explained in the accompanying motion, Covenant House and the National Center for Missing and Exploited Children are non-profit organizations with deep commitments to protecting children from sexual exploitation and abuse.

### Summary of Argument

In enacting Section 29A of Mass. Gen. Laws Ann. ch. 272 (West Supp. 1988) [Section 29A], the Massachusetts legislature made a strong governmental commitment to protect children from being solicited to participate in sexually exploitative photographs and motion pictures. The focus

of the law, on the *production* of child pornography, falls in an area where First Amendment protection was deemed virtually out of the question by both the parties and this Court in *New York* v. *Ferber,* 458 U.S. 747, 762 (1982).

Despite *Ferber,* the Supreme Judicial Court of Massachusetts found Section 29A violative of the First Amendment as overbroad and declared it void on its face—all because of one phrase, a prohibition against soliciting children for poses or exhibition in a "state of nudity." The lower court majority failed to take stock of the general threat to children which Section 29A was designed to meet; nor did it appear to understand that requests of children to pose for "merely" nude photographs are typically part of a process of seduction or coercion into sexual abuse by an adult. Because Section 29A protects crucial privacy interests of children and is aimed at harmful, nonexpressive conduct, it impacts no significant First Amendment interests. Adding some kind of "lewdness" qualification to the "state of nudity" language would, moreover, only create hopeless conceptual and evidentiary anomalies in the statute.

Even if the lower court's 4 to 3 majority were correct about some marginal effect on First Amendment interests, however, its use of "overbreadth" doctrine could not be countenanced. The decision below facially invalidates an entire statute without any showing that its purported overbreadth is in any sense substantial compared with the law's broadly legitimate scope. Further, the lower court failed to explain, as the decisions of this Court require, why some limiting construction of the challenged act is not possible under state law. For all these reasons, the decision below should be reversed.



## Introduction

I never witness a performance of child-acrobats, or the exhibition of any forced talent, physical or mental, on the part of children, without protesting . . . against the blindness and cruelty of their parents or guardians, or whoever has the care of them.

I saw at the theatre, the other night, two tiny girls, mere babies they were, doing such feats upon a bar of wood suspended from the ceiling, as made my blood run cold. They were twin sisters, these mites, with that old young look on their faces which all such unfortunates have. I hardly dared glance at them, up there in the air, hanging by their feet from the swinging bar, twisting their fragile spines and distorting their poor little bodies, when they ought to have been nestled in soft blankets in a cozy chamber. . . .

There is a noble "Society for the Prevention of Cruelty to Dumb Animals." There ought to be a Society for the Prevention of Cruelty to Little Children.[1]

—Thomas Aldrich, *The Little Violinist* (1877)

For over a century Massachusetts citizens like Thomas Aldrich have sought to protect children from becoming the hapless, exploited instruments of their elders' "speech." Thus tight restrictions were imposed on the use of child performers in theatrical exhibitions in any way that might jeopardize their schooling or health.[2] Outright prohibitions

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[1] *Quoted in* 2 *Children and Youth in America: A Documentary History* 203 (R. Bremner ed. 1971). Aldrich got at least part of his wish in 1878, with the founding of the Massachusetts Society for the Prevention of Cruelty to Children, who, it should be noted, have also filed a brief *amicus curiae* in support of the Commonwealth.

[2] The current version of those restrictions is included in Mass. Gen. Laws Ann. ch. 149, §60 (West 1982). For an early example of their enforcement see *Commonwealth* v. *Griffith,* 90 N.E. 394 (Mass. 1910).

were enacted, and eventually upheld by this Court, *Prince* v. *Massachusetts*, 321 U.S. 158 (1944), against the use of children to distribute newspapers and periodicals on the street. Similar laws are common in other states,[3] and are echoed in federal statutes.[4] They are part, of course, of more general statutory schemes to protect children from abuse and exploitation, even when, as in emotional abuse cases, the "speech" of their parents may thereby be restrained.[5]

None of these advocates a century ago, nor indeed as recently as the early 1970's,[6] imagined that despite all their efforts children and teenagers would in our time become the sexual coin of a flourishing child pornography industry—"performers" in a setting more depraved than any cheap circus or music hall. They would have applauded, though, the swift response of the Massachusetts legislature as soon as the existence of the industry became public knowledge. That response, embodied in Mass. Gen. Laws Ann. ch. 272, §29A (West Supp. 1988) ["Section 29A"],[7]

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[3] *See, e.g.*, Cal. Lab. Code §§1308.5, 1394.5, 1396 (Deering 1976), and N.Y. Arts & Cult. Aff. Law §35.01 (McKinney 1984), regulating, and in some cases forbidding, the use of child performers; and Cal. Lab. Code §1298 (Deering 1976) and N.Y. Educ. Law §3227 (McKinney 1981), restricting the use of children in newspaper distribution.

[4] *See* 29 U.S.C. §212 (1982), applied to magazine distribution by children in *Wirtz* v. *Keystone Readers Service, Inc.*, 282 F. Supp. 871 (S.D.Fla. 1968). *But see* 29 U.S.C. §213(c)(3) (1982), exempting theatrical productions and other entertainment from the federal child-labor provisions.

[5] *See* 42 U.S.C. §§5101-5102 (Supp. IV 1986); Mass. Gen. Laws Ann. ch. 119, §§51A-51G (West Supp. 1988).

[6] Thus the *Report of the Commission on Obscenity and Pornography* (1970) failed even to mention the existence or possibility of child pornography. *See* 1 *Attorney General's Commission on Pornography: Final Report* 595 (1986) [hereinafter "Attorney General's Report"].

[7] 1982 Mass. Acts ch. 364. The original version of Section 29A was adopted in 1977 Mass. Acts ch. 917, §1, with virtually identical language.



was straightforward and direct, forbidding adults from inducing, employing or causing minors to "pose or be exhibited in a state of nudity or to participate or engage . . . in sexual conduct for purpose of visual representation or reproduction. . . ." *Id.*[8]

Only six years ago this Court seemed to ensure that child pornography statutes would be accorded some "leeway" in meeting "overbreadth" challenges under the First Amendment. *New York* v. *Ferber*, 458 U.S. 747, 756 (1982); *id.* at 776 (Brennan, J., concurring). Recognizing, like Congress,[9] that such sexual exploitation "has become a serious national problem," *id.* at 749, the Court held its suppression to be "a government objective of surpassing importance," *id.* at 757, an objective justifying the exclusion of child pornography from "speech" protected by the First Amendment. *Id.* at 766. Even the possibility that some protected materials—especially those possessing "serious literary, scientific or educational value"—might technically fall within the language of the New York statute could not justify invalidation of a statute "whose legitimate reach dwarfs its arguably impermissible applications." *Id.* at 773, 776 (Brennan, J., concurring).

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[8] A companion statute banning the *distribution* of child pornography, Mass. Gen. Laws Ann. ch. 272, §29B (West Supp. 1987), is not at issue here.

[9] In enacting the Child Protection Act of 1984, Pub. L. No. 98-292, 98 Stat. 204-205 (codified at 18 U.S.C. §§2251-2254, 2256 (Supp. IV 1986), Congress made the following findings: "(1) child pornography has developed into a highly organized, multi-million-dollar industry which operates on a national scale; (2) thousands of children including large numbers of runaway and homeless youth are exploited in the production and distribution of pornographic materials; and (3) the use of children as subjects of pornographic material is harmful to the physiological, emotional and mental health of the individual child and to society." Congress first acted against the production of child pornography in 1978, with passage of the Protection of Children Against Sexual Exploitation Act, Pub. L. No. 95-225, §1, 92 Stat. 7.

Section 29A, enacted in its present form three weeks after the Court decided *Ferber*,[10] has now become the victim of precisely the kind of First Amendment/Overbreadth analysis the *Ferber* Court unanimously rejected. The Supreme Judicial Court of Massachusetts, on a 4 to 3 vote, has invalidated Section 29A in a cryptic opinion, 401 Mass. 602, 518 N.E.2d 836 (1988) that may be read one of two ways. First, the court may be seen as adhering to an absolutist concept that the First Amendment protects all activity intended to be recorded on film, despite the clearest teachings of *Ferber* and other decisions to the contrary. Or, more charitably, the court may be viewed as having rejected Section 29A because it failed to follow with exact precision the New York statute approved in *Ferber*—substituting the phrase "state of nudity" for "lewd exhibition of the genitals". *See Ferber,* 458 U.S. at 765. For whichever of these reasons, or perhaps for both, the court declared Section 29A "overbroad" under the First Amendment and invalidated it in its entirety. 401 Mass. at 605, 518 N.E.2d at 838.

Unhappily, even the most charitable reading of the Supreme Judicial Court's majority opinion will not salvage its analysis. Most fundamentally, it ignores the crucial interests of children that every word of Section 29A, even on its broadest interpretation, seeks to protect. Perhaps for that reason the lower court failed to appreciate a vital difference between this statute and the one upheld in *Ferber:* Section 29A is aimed *directly* at the underlying sexual abuse of children in the creation of child pornography rather than at a tangible, arguably "expressive" product of that abuse. As such its relationship to First Amendment concerns is substantially different from the New York statute, and substantially less troubling. Finally, though, the lower court simply misunderstood and misapplied the First Amendment "overbreadth" principles developed in *Broadrick* v. *Oklahoma,* 413 U.S. 601 (1973), *Ferber,* and later decisions of this Court. Because this lapse of judgment jeopardizes the emotional and mental health of thousands of children, the lower court's opinion should be disowned by the Court finally entrusted with preserving the integrity, and the dignity, of the First Amendment.

[10] The law was approved on July 20, 1982. 1982 Mass. Acts ch. 365.



## I.

## The Challenged Statute Directly Addresses the Transcendent State Interest in Protecting the Privacy and Health of Children.

There is likely to be little dispute in this case concerning the general proposition that recently attracted "consensus" support among social scientists: "Children and adolescents who participate in the production of pornography experience adverse, enduring effects."[11] Because the lower court so completely ignored the extent and the nature of those harms in its opinion, however, and because it has been six years since a case of this type has reached this Court, it is worthwhile to review briefly the nature of the child pornography problem at which Section 29A is directed. As a subset of that problem it is then possible to identify the specific health and privacy concerns addressed by the portion of Section 29A—covering solicitation of children to pose in a "state of nudity"—found offensive by the lower court.

### A. *Exploitation of Children in Pornography Remains an Extremely Serious National Problem.*

When the issue of child pornography swept over public consciousness in the late 1970's, evidence of its extent was

[11] E. Mulvey & J. Haugaard, *Report of the Surgeon General's Workshop on Pornography and Public Health* 13 (1986). *Accord, Attorney General's Report, supra* note 6, at 405-418, 595-614.

almost entirely anecdotal.[12] Now it is possible to state the magnitude of such exploitation with some greater degree of certainty. Thus one prominent scholar in the area of child sexual abuse found that 11 percent of the subjects in a carefully conducted random survey of women had been asked to pose for pornography prior to age eighteen.[13] Fifteen percent of runaways in a sample from the juvenile justice system were found to have been involved in pornography.[14] Most tellingly of all, perhaps, a sophisticated general survey of Canadians revealed that "over 60,000 Canadians, when they were children, may have been the subject of sexually explicit depictions." [15]

The dark consequences of that abuse have become clearer as well. Confirming earlier clinical studies relied on by the Court in *Ferber,* 458 U.S. 758n.9, later research has shown that children used in pornography experience a wide range of damaging physical and psychological effects that linger long after the sexual abuse itself has stopped.[16] Par-

[12] *See, e.g., Sexual Exploitation of Children, Hearings Before the Sub-Committee on Crime of the House Committee on the Judiciary,* 95th Cong., 1st Sess. (1977); *Texas House Select Committee on Child Pornography, Its Related Causes and Control* (1978).

[13] D. Russell, *The Secret Trauma: Incest in the Lives of Girls and Women* 162 (1986).

[14] Rabun, *Combating Child Pornography and Prostitution: One County's Approach,* in *Child Pornography and Sex Rings* 187, 196 (A. Burgess ed. 1984).

[15] 2 *Sexual Offenses Against Children: Report of the Comm. on Sexual Offenses Against Children and Youths Appointed by the Minister of Justice and Attorney General of Canada* 1198 (1984) [hereinafter "Canadian Report"].

[16] Burgess, *et al., Impact of Child Pornography and Sex Rings on Child Victims and Their Families,* in *Child Pornography and Sex Rings, supra* note 14, at 111-126 [hereinafter "Impact of Child Pornography"]; Burgess, *et al., Response Patterns in Children and Adolescents Exploited Through Sex Rings and Pornography,* 141 Am.J.Psychiatry 656, 658-659 (1984) [hereinafter "Response Patterns"]. *See also,* Mulvey & Haugaard, *supra* note 11, 13-16; Schoettle, *Child Exploitation: A Study of Child Pornography,* 19 J. Am. Acad. Child Psychiatry 289 (1980).



ticularly associated with involvement in pornography, as compared with other types of sexual abuse, is identification of the victimized child with the exploiting adult, sometimes leading the abused child himself to abuse other children.[17]

We know more, too, regarding the techniques used by adults to induce children to allow themselves to be filmed in pornography. Such adults are extremely skilled at using a combination of coercion, seduction, blackmail, and peer pressure to obtain children for pornography.[18] The "consent" of a child in this context is thus an empty concept,[19] and at no point does the opinion of the court below more closely approach the vacuous than in describing as "consenting" a young girl posing nude for her stepfather.[20] 518 N.E.2d at 837. *See id.* at 838 (O'Connor, J., dissenting). Sexual abuse of minors occurs overwhelmingly in contexts where the abuser is in a position of power or trust.[21]

[17] *Response Patterns, supra* note 16, at 661; *Impact of Child Pornography, supra* note 16, at 116-117.

[18] *Belanger, et al., Typology of Sex Rings Exploiting Children,* in *Child Pornography and Sex Rings, supra* note 14, at 51, 52-54; S. Goldstein, *The Sexual Exploitation of Children* 92 (1987); *Attorney General's Report, supra* note 6, at 406-410, 609-611.

[19] *See* Russell, *supra* note 13, at 55 (". . . consent by children to sexual encounters with persons older than themselves cannot be seen as indicative of the child's desires."); Finkelhor, *What's Wrong With Sex Between Adults and Children,* 49 Am.J.Orthopsychiatry 692, 694-695 (1979); Rosenfeld, *Treating Victims of Incest,* 8 Br.J.Sexual Med. 5, 10 (1981).

[20] This is especially so because girls are at especially high risk of sexual abuse, and of sexual abuse "at the most serious level of violation," by stepfathers. Russell, *The Prevalence and Seriousness of Incestuous Abuse: Stepfathers vs. Biological Fathers,* 8 Child Abuse & Neglect 15, 20 (1984). *Accord,* Parker & Parker, *Father-Daughter Sexual Abuse: An Emerging Perspective.* 56 Am.J. Orthopsychiatry 531, 533 (1986).

[21] D. Finkelhor, *Sexually Victimized Children* 55-57, 73-75 (1979); R. Geiser, *Hidden Victims: The Sexual Abuse of Children* 159 (1979). This is especially true of child pornography offenders. Belanger, *supra* note 18, at 52.

**B. *The State Has a Compelling Interest in Preventing the Solicitation of Children to Appear in Nude Photographs.***

If recent research has confirmed the legitimacy of previous outrage over child pornography, it has clarified as well the overall relationship between sexually invasive photography of children and sexual abuse. No fair assessment of that research can suggest any but the highest level of concern for the safety of children who are induced, seduced, or coerced to pose for nude photographs—whether or not the resulting pictures meet legal standards of "lewdness" or "obscenity."

It is important to recognize, first, that nudity is no casual matter for any but the youngest children. Thus school-age children "develop a sense of privacy about their bodies and . . . are uncomfortable with nudity, either on the parent's part or their own part," a sense which "should not be violated." [22] This appears to be particularly true for adolescents, who strongly need physical privacy from parents and others for healthy sexual and emotional development.[23] While the literature on this point is not conclusive, it does seem clear that the harmlessness of "mere"

[22] B. Justice & R. Justice, *The Broken Taboo: Sex in the Family* 215 (1979). *See* Finkelhor, *Psychological, Cultural and Family Factors in Incest and Family Sexual Abuse*, 4 J. Marriage & Family Counselling 41, 47 (1978) (describing "sexualized" families, in which dressing must take place in public, with no "respect of privacy", as at high risk for sexual abuse); Rosenfeld, *et al.*, *Familial Bathing Patterns: Implications for Cases of Alleged Molestation and for Pediatric Practice*, 79 Pediatrics 224, 228 (1987) (co-bathing of children older than 9 years with opposite-sex parent "suggestive" of sexual abuse).

[23] D. Miller, *Adolescence: Psychology, Psychopathology, and Psychotherapy* 28-29 (1974). Part of this need is no doubt due to the emotional turmoil every adolescent suffers over the rapid changes in his/her body. Schonfeld, *Adolescent Development: Determinants*, in 1 *Adolescent Psychiatry* 314, 315-319 (1971).



nudity for children is hardly something to be taken for granted.[24]

When nudity is connected to photography, however, a much clearer, much more chilling pattern emerges. For the inducement of children to pose in various stages of undress for photographs is intimately, overwhelmingly tied to the process of sexual abuse. One expert in law enforcement put it thus:

> . . . *if photos of naked children are taken, there is a great probability that the child has been molested before, during, or after the taking of the picture.* Therefore, if an investigation reveals photos of naked children, the investigator should strongly suspect that the children depicted have been abused, are in further danger, and *are in need of immediate protection.*[25]

A special Canadian commission on child sexual abuse found nude photography of children to be strongly associated both with their sexual abuse and with later involvement in more sexually explicit photographs.[26] In one earlier Massachusetts case, 63 youths who had been induced to appear in nude photographs were found to have been prostituted and sexually abused by several older men

[24] It is thus no surprise that the court below referred only to nudity of a "one-year-old" as an example of obviously harmless conduct reached by Section 29A. 518 N.E.2d at 838. Surely no naked 15-year-old could go "running on a beach or romping in a wading pool" without severe trauma, certainly not in the presence of a photographer.

[25] Goldstein, *supra* note 18, at 129 (emphasis in original).

[26] *Canadian Report*, *supra* note 15, at 1199, 1201, 1209. *See also*, Belanger, *supra* note 18, at 53 ("Initiation into the sexual activity [of a child sex ring] usually begins with indirect approaches . . . to pressure the children to exhibit themselves"); Finkelhor, *supra* note 21, at 76 (describing sex abuser as wanting "to photograph the naked child or expose himself to the child, for the child's horrified reaction").

acting in concert.[27] "Merely" nude photographs will serve perfectly well to blackmail sexually abused children into silence.[28]

It is thus possible to say three important things about the judgment below even before undertaking analysis of its soundness in legal doctrine. First, it appears largely to ignore the general threat posed by the use of children in pornography, both to their welfare and to the State's *parens patriae* interests. Second, it uses what turns out to be a very special exception—the naked one-year-old running on the beach, 518 N.E.2d at 838—to trivialize the very real physical privacy concerns of all but the youngest children. Finally, though, it is innocent of any understanding that the enticement of children into nude photography is virtually the exclusive province of certain perpetrators of sexual abuse—with the blackmail potential of such photographs making escape from molestation far more difficult. Even without an understanding of these facts the court below should have reached a different result, but with this background the First Amendment issues become that much easier to resolve.[29]

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[27] Belanger, *supra* note 18, at 62-63.

[28] Goldstein, *supra* note 18, at 127 ("Photographs, regardless of the innocent nature of their content, are also used as blackmail to keep the child quiet.")

[29] Thus the *Ferber* Court apparently found it less problematic to uphold the state statute at issue on doctrinal grounds after carefully considering the empirical and clinical evidence offered in its defense. 458 U.S. at 758-762.



## II.

### None of the Conduct Proscribed by the Statute at Issue Is Protected by the First Amendment.

It may well be that the lower court would have struck a different balance in its "overbreadth" analysis if it had properly appreciated the full scope of the threat to children posed even by their enticement to appear in "merely" nude photographs. Yet a more fundamental question looms first: is such conduct covered by the First Amendment at all? The court below declared that "[s]urely the First Amendment protects" the taking by a parent of "a frontal view picture of his or her one-year-old running on a beach," or the use of "child models" by the "artists who painted some of the world's greatest paintings." 518 N.E. 2d at 838. For a number of reasons *Amici* are not at all sure of that proposition.

Before outlining those reasons, however, it is worth noting an extremely important fact about *Ferber:* it was a case focusing on the First Amendment status of materials already in existence. That is not to say it concerned "speech" as opposed to "conduct," a distinction *Amici* believe to be only of limited value.[30] Rather, the crucial difficulty for the Court in *Ferber* was that it was being asked to allow the State to attack an underlying evil—sexual abuse of children in the making of pornography—by banning expression at one level removed from it, that is, at the distribution phase.[31] Thus the Court had no occasion

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[30] *See* Henkin, *The Supreme Court, 1967 Term—Foreword: On Drawing Lines,* 82 Harv. L. Rev. 63, 79 (1968). *But see, Payne* v. *Commonwealth,* 623 S.E.2d 867, 871-872 (Ky. 1981), *cert. denied,* 456 U.S. 909 (1982) ("use" of children in sexual photographs "less favored" under First Amendment than distribution of photos).

[31] The Court did recognize, of course, that distribution of child pornography inflicts additional injury on children used in production, 458 U.S. at 759, but chiefly emphasized the need to stop distribution as a means to discourage production. *Id.* at 758-761.

to consider the limits of State power in confronting production of such materials directly; it had only to note such power exists. 458 U.S. at 758, 762. The guidelines laid out by *Ferber* for assessing state child pornography statutes, *id.* at 764-766, thus by their terms applied only to bans on *distribution.* With respect to bans on production of explicit sexual materials using children, which attack offensive behavior directly rather than through the strategic suppression of expressive materials resulting from it, *Ferber* itself stands as no obstacle to according the States far greater discretion.[32]

Even as Section 29A attacks sexual exploitation head-on, moreover, it contains an important provision that moots the most troubling question presented by *Ferber:* whether defined materials with scientific, educational or literary value should receive First Amendment protection. *Compare id.* at 774-775 (O'Connor, J., concurring), *with id.* at 775-777 (Brennan, J., concurring in the judgment). An affirmative defense is afforded for production undertaken "for a bona fide scientific or medical purpose, or for an educational or cultural purpose for a bona fide school, museum or library." §29A. Absent an extremely narrow construction of this defense,[33] the statute seems in this

[32] One obvious difference between distribution and production bans, for example, was explored by Justice Stevens in his *Ferber* concurrence: the former inevitably affect materials produced outside the jurisdiction and perhaps even before the law became effective, while the latter chills only local, prospective conduct. *See id.* at 779.

[33] The court below avoided any mention of this affirmative defense, and failed to consider its effect on the statute's overall validity. Certainly reputable authors and artists have schools, libraries, and museums in mind when they prepare their works, so it is difficult to see how any works of "value" will be suppressed by Section 29A. *Amici* note, however, that "value" to viewers often will mean no less harm to the children depicted, *Ferber,* 458 U.S. at 774-775 (O'Connor, J., concurring); thus this affirmative defense is troublesome as a matter of policy.



respect far more limited in scope than the one upheld in *Ferber.*

*Ferber,* then, is not dispositive of this case, but its complex analysis tips, if anything, on the side of the State. That seems especially so if the following First Amendment considerations are taken into account: (1) the statute is a paradigmatic effort to protect crucial privacy rights of young citizens unable to protect themselves; (2) no recognizable interests in "expression" distinguish the conduct proscribed under Section 29A from that which is plainly within the State's power to ban; and (3) the "lewdness" of a nude picture is unknowable and irrelevant prior to its taking. Each of these propositions separately, and most certainly the three of them taken together, strongly argue against giving First Amendment refuge to any of the conduct described in Section 29A.

### A. *Section 29A Is a Direct, Wholly Permissible Effort by the State to Protect the Privacy Rights of Children.*

Since *Ferber,* and partially because of it, First Amendment cases and commentaries have begun to take serious account of what Professor Tribe has called the "individual's right to retain control over personal information."[34] *Ferber,* of course, denied protection to child pornography in part because of "the force of the privacy interests" of child performers violated by its distribution. 458 U.S. at 759n.10. Just this last term the Court denied First Amendment protection to a student newspaper "not sufficiently sensitive to the privacy interests" of pregnant girls, their boyfriends and their families. *Hazelwood School District* v. *Kuhlmeier,* —— U.S. ——, ——, 108 S.Ct. 562, 571, 98 L.Ed.2d 592, 607 (1988). The First Amendment must, ultimately, be harmonized with "the individual interest in

[34] *American Constitutional Law* 889 (2d ed. 1988). *See* Hill, *Defamation and Privacy under the First Amendment,* 76 Colum. L. Rev. 1205, 1253-1291 (1976).

avoiding disclosure of personal matters." *Whalen* v. *Roe,* 429 U.S. 589, 599 (1977). *See Globe Newspaper Co.* v. *Superior Court,* 457 U.S. 596, 607 (1982).[35]

Nudity, even without sexual conduct, is a "highly private" fact. *Wood* v. *Hustler Magazine, Inc.,* 736 F.2d 1084, 1093 (5th Cir. 1984), *cert. denied,* 469 U.S. 1107 (1985); *York* v. *Story,* 324 F.2d 450, 455 (9th Cir. 1963), *cert. denied,* 376 U.S. 939 (1964). That is especially so, as discussed above,[36] for children and teenagers, who are puzzled by, and often ashamed of, their rapidly changing bodies. They are, moreover, ill-equipped to decide when to waive these privacy rights, for once forfeited they cannot easily be recovered, *see Shields* v. *Gross,* 58 N.Y.2d 338, 448 N.E.2d 108 (1983), and decisions even by family members to permit or persuade a child to be photographed in the nude are all too often made with ulterior motives of child seduction.[37]

Section 29A, in short, seeks merely to protect vital privacy interests of children until they reach the age of majority and can make such decisions for themselves. Because of the especially intrusive character of nude photography and its integral connection to sexual abuse, the statute's scope—which excludes, again, works of some scientific, educational or cultural value—precisely matches the important interests at stake. More importantly, it is a far more direct vindication of children's privacy rights than are bans on distribution: (1) the actual filming is of course more intrusive than subsequent viewings of which

[35] *Globe Newspaper,* it should be noted, involved the First Amendment rights of the press and the public to attend criminal trials, a societal interest of the highest importance. Even in the face of that interest, however, the Court recognized the legitimacy of closing courtrooms on a case-by-case basis to accommodate the "compelling" privacy interests of juvenile rape victims. 457 U.S. at 607-608.

[36] *See* text to notes 22-23, *supra.*

[37] *See* text to notes 25-28, *supra.*



a child may be completely ignorant; and (2) given the easily replicable nature of photography, it is extremely difficult to stop the disclosure and circulation of child pornography once made. In sum, the conduct described by Section 29A, even if properly characterized as expression, is "speech" which "by [its] very utterance inflicts injury." *Chaplinsky* v. *New Hampshire,* 315 U.S. 568, 571-572 (1942).

### B. *Section 29A Attacks No Conduct That Can Properly Be Labelled "Speech" Under the First Amendment.*

But *is* the solicitation of children to pose naked in front of a camera "speech" in any meaningful constitutional sense? Perhaps that question is best approached by contrasting the lower court's "speech" paradigm—parents filming a naked one-year-old—with a slightly different one: a nonfamily guest who sneaks into the bathroom to snap nude photographs of a 15-year-old.

Clearly no First Amendment protection for photography will protect the prying visitor.[38] But what distinguishes the two cases, other than the age of the photographed child and the family relationship of the photographer? Yet neither distinction has anything to do with any theory of the First Amendment or any defensible definition of "speech".[39] We might posit some theory of family "privacy" to distinguish the two situations, but it would be

[38] *See Hill, supra* note 34, at 1290.

[39] *See, e.g.,* Tribe, *supra* note 34, at 837 ("It is not plausible to uphold the right to use words as projectiles where no exchange of views is involved."); Schauer, *Speech and "Speech"—Obscenity and "Obscenity": An Exercise in the Interpretation of Constitutional Language,* 67 Georgetown L.J. 899 [First Amendment encompasses "intellectual (and perhaps public) communication and not self-expression" *id.* at 932]. If, to vary the scenario, the visitor took photos of the 15-year-old romping, like the lower court's treasured toddler, naked on a public beach, *he* perhaps could not be subject to penalty but of course the teenager could, for indecent exposure.

a principle resting on quite different values from "freedom of speech".[40]

What is missing from *both* these fact patterns, of course, is the individual, informed consent of the photographed child. Because it is the *subject's* body that is the "content" of the photograph, its making should only be treated as protected "speech" if such consent has been obtained. Thus "[w]ithout question a state may prohibit fraud, trickery, or the use of force to induce people to perform—in pornographic films or in any other films." *American Booksellers Ass'n* v. *Hudnut,* 771 F.2d 323, 332 (7th Cir. 1985), *summarily aff'd,* 475 U.S. 1001 (1986).[41] Children are not unique in being exploited in pornography,[42] but because they are "not possessed of that full capacity for individual choice which is the pre-supposition of First Amendment guarantees," *Ginsberg* v. *New York,* 390 U.S. 629, 649-650 (1968) (Stewart, J., concurring), the State may take special pains to protect them.

Through Section 29A, Massachusetts does not permit minors to give "consent" to posing for nude photographs, except those with some serious public value. Given the special privacy interests at stake, the connection of such conduct to sexual abuse, and the State's undoubted right to protect minors from sexual involvement, *see Michael M.* v. *Superior Ct. of Sonoma Co.,* 450 U.S. 464, 472n.8 (1981)

[40] Such a theory would also run squarely into *Prince* v. *Massachusetts,* 321 U.S. 158 (1944), where the Court specifically rejected the special "claim of parental right" with which a mother attempted to bolster her larger First Amendment claim to express herself through her daughter. *Id.* at 164, 170.

[41] *See* Tribe, *supra* note 34, at 915 n.71. *See also Joseph Burstyn, Inc.* v. *Wilson,* 343 U.S. 495, 502-503 (1952) ("Nor does it follow that motion pictures are necessarily subject to the precise rules governing any other particular method of expression. Each method tends to present its own peculiar problem.")

[42] For an overview of the sad plight of many adults in the commercial pornography industry, see *Attorney General's Report, supra* note 6, at 837-900.



and *id.* at 497 (Stevens, J., concurring), that legislative judgment seems defensible and constitutional. Once such consent is unavailable, though, the First Amendment seems utterly inapplicable to the process of inducing a child to pose naked before a camera. Obviously, in this context as in *Ferber,* photographers have the option of using older-but-appearing-younger models, 458 U.S. at 762-763. And as in *Ferber,* there is no "question here of censoring a particular literary theme or portrayal of sexual activity." 458 U.S. 763. First Amendment interests are simply not involved—or are involved at a level much less troublesome than they were in *Prince* v. *Massachusetts,* 321 U.S. 158 (1944), where another Massachusetts citizen was not permitted to use her child in exercising her own First Amendment rights,[43] or in *Clark* v. *Community for Creative Non-violence,* 468 U.S. 288 (1984), where the "conduct" (sleeping in the park) was far less dangerous and the intended message overtly political.

### C. *A Requirement of "Lewdness" as Part of the Definition of Soliciting Children for Pornography Is Fundamentally Illogical.*

The irrelevance of First Amendment doctrine to the conduct described by Section 29A becomes even plainer if the view of the lower court is simply carried to its logical end—*i.e.,* by looking at what the statute would look like if the "state of nudity" it describes were limited to "lewd" portrayals. Unless the lower court simply meant to disregard *Ferber,* that is the only possible distinction between the definitions of covered materials in the Massachusetts and New York statutes.

[43] Although the Court in *Prince* admonished Mrs. Prince severely that she might not "make martyrs of [her] children", 321 U.S. at 170, the record of the case provided no support for injury to the child even remotely comparable to that threatened by participation in even the mildest forms of child pornography. *See id.* at 174-175 (Murphy, J., dissenting).

What, then, is the result if only solicitation for "lewd" photographs involving nudity is covered? In two words, conceptual chaos. For the culpability of a given defendant in procuring a child for a nude photograph will be indeterminate until after a "lewd" photograph is actually taken. That is, the judgment of whether a given depiction is "lewd" simply cannot be made until the depiction itself exists, and it will depend on the reaction of others, a reaction unknowable at the time of soliciting the child. If someone other than the procurer takes the photograph, such "lewdness" will be in the hands of a person entirely different from the procurer. Thus, with reference to the lower court's putative toddler, a mother who sent the child out to the beach naked could find her fate hinging on which camera angle her husband chose to use.

Pedophiles, of course, do not declare to children in advance that the photographs they want to take are "lewd" or "lascivious" or "for the purpose of sexual stimulation." Placing such limitations on solicitation offenses in this context will only mean that law enforcement is helpless to act until a child has actually been sexually exploited. By asking a child to undress in front of a camera—to shed his privacy and become desperately vulnerable to abuse and blackmail—an adult has done quite enough to justify intervention by the State.

That this is the only plausible reading of *Ferber* is demonstrated by examining another prong of the formula it established for distribution statutes. Citing *Smith* v. *California,* 361 U.S. 147 (1959), and *Hamling* v. *United States,* 418 U.S. 87 (1974), the Court noted that: "As with obscenity laws, criminal responsibility may not be imposed without some element of scienter on the part of the defendant." 458 U.S. at 765. But *Smith* and *Hamling* require a showing that defendants "knew the character and nature of the materials" at issue. *Hamling,* 418 U.S. at 123. Those whose participation in child sex rings comes *prior* to creation of the pornography could never be shown to have such



knowledge in advance. Thus it seems clear that "scienter" at a production phase of child pornography must be different from that during distribution, and that the *Ferber* Court never intended to impose the "lewdness" straightjacket on prohibitions against the exploitive acts underlying what eventually becomes "child pornography".[44]

## III.

### Even If a Fraction of the Conduct Described in the Statute at Issue Is Protected by the First Amendment, the Statute Is Not Unconstitutionally Overbroad.

Because Section 29A, while inartfully drafted,[45] nevertheless offends no discernable First Amendment interests, it hardly seems to require scrutiny for "overbreadth," a mode of analysis that is to be used "sparingly and only as a last resort." *Broadrick* v. *Oklahoma,* 413 U.S. 601, 613 (1973). Even if the lower court were correct in spotting some fleeting conflicts between the law and protected activity, it failed utterly to perform two crucial tasks prior to its constitutional *coup de grace.* First, it neglected to consider carefully whether those conflicts are truly "substantial"; second, it avoided facing up to the possibility of a narrowing construction of the statute. As both of these steps are integral parts of "overbreadth" analysis, the lower court's judgment is hopelessly flawed; and be-

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[44] It is worth noting, of course, that the "value" affirmative defense in Section 29A also poses difficulties conceptually, for how can one know in advance whether a photo will have scientific or other value? At least in the context of *producing* child pornography, *Amici* support statutory language that defines conduct not tied to *post hoc* "lewdness" or "value" assessments. Simply because Section 29A already has one such anomaly, however, does not mean the Constitution requires it to have two.

[45] The maze of prepositional phrases makes the first sentence of Section 29A less than elegantly clear, and it is quite impossible to determine what the word "posture" represents in the second paragraph.

cause the second of them can only be performed by a state court, it is impossible for this Court to fill in the blanks.

### A. *No Basis Exists for Believing the Challenged Act Will Have Any Substantial Impact on Protected Speech.*

Because of the close similarity between the challenged law and the *Ferber* criteria, 458 U.S. at 764-766, and because of the vast extent of child sexual abuse against which it may clearly be used, Respondent cannot assert, in his "overbreadth" claim, that the law "could never be applied in a valid manner." *See City Council* v. *Taxpayers for Vincent,* 466 U.S. 789, 798 (1984). He is thus relegated to showing that it "nevertheless is so broad that it 'may inhibit the constitutionally protected speech of third parties.'" *New York State Club Assn., Inc.,* v. *City of New York,* No. 86-1836, slip op. at 8 (U.S. June 20, 1988) (quoting *Taxpayers for Vincent, supra,* 466 U.S. at 798). Under that latter test, however, particularly as explicated in *Ferber* and *New York State Club Assn., supra,* his claim is equally unfounded.

A wide range of sexually exploitative conduct, to begin with, is legitimately within Section 29's reach under the clear holding of *Ferber*—that is, all solicitation of children for sexually explicit photographs except, arguably, those involving "mere" nudity. 458 U.S. at 764-766. But how much speech does "mere" nudity represent, and what is the likelihood it will be inhibited by the statute? Like the unsuccessful appellant in *New York State Club Assn., supra,* slip op. at 11, Respondent has created no record identifying the third parties likely to be affected, offering only speculation that some parents will not photograph their children and that some movie makers will fear to shoot "Blue Lagoon." Resp. Br. in Opp. 6. Yet no one seriously doubted in *New York State Club Assn.* that some private clubs would "fall within the potential reach"



of the law and yet still be "deserving of constitutional protection." *Id.,* slip op. at 2 (O'Connor, J., concurring). And no member of the Court in *Ferber* believed the child pornography statute there to be free from potentially troubling applications. 458 U.S. at 773. What those cases have in common with this one is that no basis in the record exists for believing that those applications will occupy more than a tiny fraction of the law's ambit. No prosecution has been launched or has been threatened against any of the conduct conjured up by Respondent. In such circumstances the common-sense teaching of the cases is that "whatever overbreadth may exist should be cured through case-by-case analysis of the fact situations to which [the law's] sanctions, assertedly, may not be applied." *Broadrick* v. *Oklahoma,* 413 U.S. 601, 615-616 (1973). This is especially true here, where in contrast with the "pure speech" scenario of *Ferber,* 458 U.S. at 771, the focus of the law is clearly on "conduct"—which even if arguably "expressive" clearly "falls within the scope of otherwise valid criminal laws that reflect legitimate state interests." *Broadrick, supra,* 413 U.S. at 616.

### B. *The Lower Court Misapplied the "Overbreadth" Doctrine by Failing to Attempt to Find a Narrowing Construction of the Statute.*

A conceptual twin of the "substantiality" prong of "overbreadth" doctrine is even more to the point: "Facial overbreadth has not been invoked when a limiting construction has been or could be placed on the challenged statute." *Broadrick, supra,* 413 U.S. at 613. Only when it is patently clear no such construction is possible, *see, e.g., Gooding* v. *Wilson,* 405 U.S. 518 (1972), is it appropriate for federal courts to invalidate an entire statute for "overbreadth." *Ferber, supra,* 458 U.S. at 769n.24.

Yet as *Ferber* also taught, state courts should not "err on the side of an overly broad reading of [the Court's]

doctrines and precedents" and "entertain an overbreadth when not required to do so by the Constitution." *Id.* at 767. The construction of state statutes by state courts will always be considered authoritative by federal courts, *Wainwright* v. *Stone,* 414 U.S. 21, 22-23 (1973); yet it seems implicit in the analysis of *Broadrick* and *Ferber* that it is improper for a state court to confront a federal constitutional challenge and *fail* to construe the statute altogether in light of federal "overbreadth" principles.

That is what, remarkably, happened in this case. The majority below made no attempt to parse the language of Section 29A to see if it could be saved by a limiting construction of the phrase "state of nudity." Without even a nod toward standard construction techniques the majority simply declared the law overbroad and void *in toto.* 518 N.E.2d at 838. Thus, as the dissenters pointed out, the majority failed even to consider the simple possibility of severing the offending language on nudity, leaving the plainly valid remainder of the statute intact. *Id.* at 841n.4. Further, the lower court ignored its own longstanding rule that "[w]here possible, we construe statutes in such a way that they are constitutional." *Commonwealth* v. *King,* 372 N.E. 2d 196, 203 (Mass. 1977) (construing state prostitution statute to avoid overbreadth problems).[46] In sharp contrast, the New York Court of Appeals in *Ferber* carefully analyzed the statute at issue there to see if it could be limited in scope, 52 N.Y.2d 674, 422 N.E.2d 523 (1981)—a fact twice noted by this Court in its opinion. 458 U.S. 752, 769n.24. *See also, Gooding* v. *Wilson, supra,* 405 U.S. at 524-528 (detailing various

[46] The failure of the lower court to attempt a saving construction of Section 29A is particularly inexplicable in view of its previous willingness to narrow the state's obscenity statute to meet constitutional objections. *Commonwealth* v. *707 Main Corp.,* 357 N.E.2d 753, 759 (Mass. 1976). *See United States* v. *12 200-Ft. Reels,* 413 U.S. 123, 130n.7 (1972) (narrowing federal obscenity statute to eliminate obsolete language).



state court constructions of challenged statute before entertaining facial attack).

What is particularly puzzling about the approach of the majority below is that the structure and history of the challenged statute would seem easily to support a narrower construction of Section 29A. Thus definition of the phrase "state of nudity," which so troubled the majority, is preceded by the statement in Section 31 of Mass. Gen. Laws Ann. ch. 272 (West 1980) that it will apply "*unless the context requires otherwise.*" (Emphasis added.) Clearly, then, the legislature did not insist on an inflexible, literalist reading of the definition of "state of nudity"; surely, too, the "context" of the First Amendment as interpreted by the majority would seem to support the sort of constitutionally required narrowing construction Massachusetts courts have frequently used before.[47] That is all the more compelling because Section 29A was, after all, enacted in its present form less than a month after *Ferber* was decided;[48] if anything it appears to have been approved in eagerness to *comply* with that decision rather than to flout it.

When a state court has manifestly failed to resolve an issue of state law crucial to determining a federal constitutional issue, this Court has not hesitated to require reexamination below. *Employment Division, Dep't of Human Resources of Oregon* v. *Smith,* —— U.S. ——, 99 L.Ed.2d 753, 766 (1988); *Hicks* v. *Feiock,* —— U.S. ——, 99 L.Ed. 2d 721, 735-737 (1988). In the context of "overbreadth" analysis, where facial invalidation is supposed to be an

[47] The words "pose" and "be exhibited" in Section 29A might, too, be properly construed to have a somewhat restricted meaning; it is important to note they are used *only* in connection with nude photography, not sexual conduct. Thus unstaged photography in the home, where no child is being asked to "pose" nor is being "exhibited" publicly, might well be excluded from Section 29A's reach after careful review on remand.

[48] See text to note 10, *supra.*

absolute last resort, a state court must at least explain, as did the New York Court of Appeals in *Ferber,* why no narrower construction of the statute is possible. Otherwise such court will be exercising federal power to frustrate a legislative mandate in a manner no federal court would undertake to do.

*Ferber* recognized this as an untenable result, 458 U.S. at 767, but its teaching was lost on the court below. If the existence of some threatened First Amendment interests compel a facial "overbreadth" review of Section 29A, that review should be conducted only after the Massachusetts Supreme Judicial Court has clarified why a narrower construction of the law—*e.g.*, one giving a restricted definition to the words "pose" and "be exhibited" [49]—is not possible. Thus even if First Amendment interests are implicated in this case, and even if Section 29A may "substantially" infringe upon them—both propositions which *Amici,* of course, deny—the decision of the court below still cannot stand without a good-faith effort to find a narrowing construction.

## CONCLUSION

> "Dear me!" said Nicholas, "it's extraordinary."
>
> It was, for the infant phenomenon, though of short stature, had a comparatively aged countenance, and had moreover been precisely the same age . . . for five good years. But she had been kept up late every night, and put on an allowance of gin-and-water from infancy, to prevent her growing tall, and perhaps this system of training had produced in the infant phenomenon these additional phenomena.[50]

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[49] *See* note 47, *supra.*

[50] C. Dickens, *Nicholas Nickleby* 365 (Penguin ed. 1981) (1st ed. London 1838-1839).



Thus did Charles Dickens affectionately introduce Miss Ninetta Crummles, the "infant phenomenon," condemned in *Nicholas Nickleby* to be forever young, forever famous, and forever untalented. Dickens was, characteristically, far ahead of his time in seeing the misuse of a child in what seemed to others an innocent indulgence of adult power. That other children of the era were exploited in even worse ways[51] did not blind Dickens to the dangers facing children performing for the pleasure of their elders.

Nor should the continued production and distribution of the most extreme kinds of child pornography blind us to what is at stake in this case: the entirely reasonable attempt of Massachusetts to protect children from solicitations that are overwhelmingly part of a process of sexual seduction and coercion, and that are highly destructive of privacy and normal development. The First Amendment should not be available as a shield for child abuse, and its greatest corollary, the "overbreadth" doctrine, should not be invoked lightly. Asking a child to undress for a photograph is conduct that might, in some circumstances, be morally defensible, but it is not part of the "breathing space" of the First Amendment. *Broadrick, supra,* 413 U.S. at 611.[52]

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[51] Thus compare the phenomenon's father, the lovable Mr. Vincent Crummles, with the odious Wackford Squeers.

[52] *See* Schauer *Codifying the First Amendment: New York* v. *Ferber,* 1982 Sup. Ct. Rev. 285, 289, 299-302 (1983); Schauer, *supra* note 39, at 927 ("The issue is not whether the activity has social value, but whether it is speech." *Id*).

The judgment of the Supreme Judicial Court of the Commonwealth of Massachusetts should be reversed.

Respectfully submitted,

GREGORY A. LOKEN*
Institute for Youth Advocacy
Covenant House
460 W. 41st Street
New York, New York 10036
(212) 613-0349

DAVID W. LLOYD
National Center for Missing
and Exploited Children
1835 K Street, N.W., Suite 700
Washington, D.C. 20006
(202) 634-9821

*Counsel of Record

*Counsel for Movants-Amici Curiae*

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NO. 87-1651

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1988

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*Petitioner,*

vs.

DOUGLAS OAKES,

*Respondent.*

**ON WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT FOR THE COMMONWEALTH OF MASSACHUSETTS**

## BRIEF OF THE STATE OF INDIANA AS AMICUS CURIAE IN SUPPORT OF PETITIONER

LINLEY E. PEARSON
*Attorney General of Indiana*

WILLIAM E. DAILY
*Deputy Attorney General*

Office of Attorney General
219 State House
Indianapolis, Indiana 46204
Telephone: (317) 232-6217

*Central Publishing Company, Inc., Indianapolis, IN 46206*

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## BRIEF OF THE STATE OF INDIANA AS AMICUS CURIAE IN SUPPORT OF PETITIONER

### INTEREST OF THE AMICUS CURIAE

Indiana has a compelling interest in preventing the sexual abuse and exploitation of children. Indiana's criminal code contains a statute (Ind. Code Section 35-42-4-4) which makes it a crime to photograph nude children under sixteen years of age with the intent to arouse the sexual desires of any person. Photographs of nude children may also fall within the definition of obscenity under Indiana law. *See* Ind. Code Sections 35-49-1-10(3) and 35-49-2-1.

The decision by this Court in this case may affect the ability of the State of Indiana to prevent the sexual abuse and exploitation of Indiana children.

## SUMMARY OF THE ARGUMENT

The Massachusetts statute in question is a narrowly drawn statute which validly proscribes the posing or exhibition of children in a state of nudity. The States have a valid and compelling interest in proscribing such activity. The statute in question will not chill any real or reasonably foreseeable exercise of the rights of free speech; the statute will hopefully chill the exploitation and abuse of children.

## ARGUMENT

The Massachusetts law is clearly addressed to the valid and worthwhile goal of preventing the abuse and exploitation of children. The Respondent asserts that the Massachusetts law is overbroad and, because of the overbreadth, will impermissibly chill the exercise of free speech. Contrary to the assertions of the Respondent, however, the Massachusetts law proscribes a narrow set of activities: No person may encourage or permit a child to pose or be exhibited in a state of nudity. The statute does not prohibit the photographing of pre-pubertal children unless the genitals or pubic area is exposed. The statute does not prohibit the depiction of nudity if the depiction is intended for scientific, medical, educational or cultural purposes.

The only activity possibly "chilled" by the Massachusetts statute is the posing or exhibition of nude children. That is a valid and, indeed, laudable exercise of the powers of the State.

> It is evident beyond the need for elaboration that a State's interest in "safeguarding the physical and psychological well-being of a minor is "compelling." *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 607.

*New York v. Ferber*, 458 U.S. 747, 756 (1982).

*New York v. Ferber*, 458 U.S. 747 (1982) was this Court's first examination of a statute prohibiting depictions of sexual



activity involving children. The Court recognized that "laws directed at the dissemination of child pornography run the risk of suppressing protected expression by allowing the hand of the censor to become unduly heavy." But, the Court held, "the States are entitled to greater leeway in the regulation of pornographic depictions of children." 458 U.S. at 756.

In *Ferber* this Court recognized the severity of the problem posed by the exploitation of children, and the Court declined to second-guess the State's approach to solving the problem. The *Ferber* Court assumed that the laws prohibiting the employment of children in pornographic photographs were constitutional 458 U.S. at 762. Under *Ferber* a person may be convicted of engaging in child pornography even if the photographs do not appeal to the prurient interest of the average person and even if the photographs do not portray sexual conduct in a patently offensive way. 458 U.S. at 764.

This Court will not look for "every conceivable situation which might possibly arise in the application of complex and comprehensive litigation" in order to strike down a statute as overbroad. *U.S. v. Raines*, 362 U.S. 17, 21 (1960). While the First Amendment overbreadth cases are an exception to the general rule, the overbreadth doctrine should be applied only as a last resort. *Broadrick v. Oklahoma*, 413 U.S. 601, 613 (1973).

A statute which may be validly applied to a substantial number of situations should not be struck down because of hypothetical, marginal applications. *See Parker v. Levy*, 417 U.S. 733, 760 (1974).

In most cases which involve obscenity, public indecency or child pornography, the defendants assert that a statute, if applied in an unreasonable manner, will chill someone's right to free speech. It is likely that a hypothetical situation can be constructed for any criminal statute which would "prove" that the criminal statute "chills" free speech.

This Court, in recent cases, has adopted a rational and responsible approach to the overbreadth doctrine. *See*

*especially, Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491 (1985); *Arcara v. Cloud Books, Inc.*, 106 S.Ct. 3172 (1986). The Supreme Judicial Court for the Commonwealth of Massachusetts has mis-read and mis-applied the case precedents of this Court. Tne court below was incorrectly and improperly concerned with highly unlikely applications of the Massachusetts statute.

## CONCLUSION

The decision of the Supreme Judicial Court of the Commonwealth of Massachusetts should be reversed. The Massachusetts statute does not present a real and substantial threat to the exercise of the freedom of speech. The only activity which can reasonably be expected to be "chilled" is the exhibition of children in a state of nudity. The Massachusetts statute is a valid exercise of State power addressing a compelling State interest in safeguarding the physical and psychological well-being of minors.

Respectfully submitted,

LINLEY E. PEARSON
*Attorney General of Indiana*

WILLIAM E. DAILY
*Deputy Attorney General*

Office of Attorney General
219 State House
Indianapolis, Indiana 46204
Telephone: (317) 232-6217

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**ON WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT FOR THE COMMONWEALTH OF MASSACHUSETTS**

---

# BRIEF OF THE AMERICAN SUNBATHING ASSOCIATION, INC. *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

---

ROBERT T. PAGE*
General Counsel for the American Sunbathing Association, Inc.

540 Steele Park Building
50 South Steele Street
Denver, Colorado 80209
Telephone: (303) 393-0433

* Counsel of Record

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# BRIEF OF THE AMERICAN SUNBATHING ASSOCIATION, INC. *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

---

## INTEREST OF THE *AMICUS CURIAE*

The American Sunbathing Association, Inc. (ASA) is a nonprofit corporation organized under the laws of the State of Florida. The organization serves as the principal interest group and spokesman for social nudism in North America. At its founding in 1931, the ASA adopted the following Principles and Standards:

> We believe in the essential wholesomeness of all human bodies and of the natural functions and activities which they perform. We believe in the naturalness of social nudism, and we consider that exposure of the entire human body to sun, light and air is beneficial. We believe that we have the right to practice social nudism, provided that we do not infringe upon the rights of others. ASA Bylaws, Art. II (1987 ed.).

Headquartered with a professional staff in Kissimmee, Florida, the ASA has about 30,000 members and some 200 clubs in the United States and Canada, including four established clubs in the State of Massachusetts. The ASA is affiliated with the worldwide International Naturist Federation headquartered in Antwerp, Belgium.

Social nudism as practiced within the clubs of the ASA provides a wide range of activities for people of all ages. Athletics, social recreation, and interpersonal communication promote the betterment of body and mind and strengthen family bonds.

Modern[1] social nudism generally traces its beginnings to turn-of-the-century Germany, where *freikorperkultur* ("free body culture") parks were established with emphasis on outdoor physical conditioning, vegetarianism, and clean

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1 As far back as ancient Greece, the unclothed human body has been accepted at certain times and places as both fitting and proper. In his "Life of Lycurgus," Plutarch wrote of the Spartan ruler:

> [He] ordered the maidens to exercise themselves with wrestling, running, throwing the quoit, casting the dart. . . . And to the end that he might take away their over-great tenderness and fear of exposure to the air, and all acquired womanishness, he ordered that the young women should go naked in the procession, as well as the young men, and dance, too, in that condition, at certain solemn feasts, singing certain songs, whilst the young men stood around seeing and hearing them. . . . Nor was there anything shameful in this nakedness of the young women; modesty attended them and all wantonness was excluded. It taught them simplicity and care for good health, and gave them some taste for higher feelings, admitted as they were, thus, to the field of noble action and glory.

Plutarch, Lives of the Noble Grecians and Romans 59-60 (Mod. Lib. ed. 1967).



living. Caffeine, tobacco, and alcohol were taboo. This history, with its air of self-justification, is responsible for some jokes and misperceptions of nudists as a cult carrying on activities in semi-secret "colonies." Fortunately, this image is changing as people recognize nudism as a legitimate choice of living style or preferred adjunct to recreation.[2]

In 1980 the Naturist Society was founded in Oshkosh, Wisconsin, to focus on the interest in the larger phenomenon of so-called free beaches and similar recreational use of public lands in secluded areas, hot springs and traditional locations long used for skinny dipping. Some of those areas, like Black's Beach in San Diego, California, have become as famous as they are popular, not unlike the growth which has occurred in the Mediterranean nudist resort playgrounds of Spain, France and Yugoslavia.[3] In other locales, such as Rooster Rock State Park, Oregon, and Lake Travis, near Austin, Texas, local governments have established official nude beach areas with appropriate park facilities and signs to advise the public.[4]

A Gallup poll conducted in 1983 showed not only a seventy-two percent majority acceptance of the idea that there should be designated areas for nude recreation, but also found that fifteen percent of those surveyed had experienced social nudism in one setting or another.[5]

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2 *See, e.g.*, Goodrich, *Skinny Dipping: The Old Swimming Hole Breeds New Controversy*, Parks & Recreation, May 1980 at 33. A thorough exposition of the history and philosophy of the nudist movement in Europe and North America is given in *Roberts v. Clement*, 252 F. Supp. 836 (E.D. Tenn. 1966).

3 L. Baxandall, World Guide to Nude Beaches and Recreation 140 (Crown 2d ed. 1983).

4 *See, e.g.*, Harker, *Nude Bathing, No Controversy*, Parks & Recreation, August 1987 at 58-61; Kellum and Lovelace, *To Bare or Not to Bare: The Constitutionality of Local Ordinances Banning Nude Sunbathing*, 20 U. Rich. L. Rev. 589 (1986).

5 Gallup Organization, Inc., Most Americans Approve of Nude Recreation (Princeton, N.J., June, 1983).

Children are natural nudists.[6] They especially benefit from social nudism and quickly overcome curiosity and shyness, learning to accept their bodies regardless of their stage of maturity. They are seldom embarrassed or ashamed of their bodies and consequently have a healthier sexual attitude.

Nudists believe in the proper photographic portrayal of children enjoying the family nudist lifestyle whether the setting be a nudist park, beach, or home. It is our purpose to educate and differentiate between this legitimate nudist photography and that which we deplore: the exploitation of children as objects of pornography or violence.

The ASA is dedicated to the welfare of our present and future adherents, especially our children. In no sense would we wish to be seen as tolerant of any form of sexual exploitation of a child or adult. We believe that the protection of our First Amendment freedom to express our principles and standards strengthens everyone's ability to distinguish the open, joyful, and natural portrayal of body freedom from any form of degradation.

We find the nudist philosophy, with its natural acceptance of the basic human worth of each individual, to be of specific value to growing children. As one investigation concluded:

> [N]udist children may have an advantage over a great many other children in our culture who have never been exposed to the same or opposite sex in the nude. We view this as a positive aspect of nudism, for both the children and adults. It not only gives children the opportunity to see that they are like other boys and girls, but it gives the parents the opportunity to notice

6 A. Neill, Freedom, Not License 87 (Hart 1966).



> that Johnny and Jane are developing at about the same maturation rate as the other youngsters their age.

W. Hartman, M. Fithian and D. Johnson, Nudist Society 130-31 (Crown 1970). *See also*, M. Mead and R. Metraux, A Way of Seeing 161 (McCalls 1970).

From its very beginnings, the nudist movement has had a family-oriented philosophy. Belief in the fundamental wholesomeness of the human body extends to people of all ages. We believe that the ability to realize this special form of freedom eliminates the common connection others make between nudity and sex. Nudists have standards and regulations about photography which are characterized by good manners, respect for privacy, and anonymity.

The publication and information functions of the ASA are of utmost importance. To illustrate, just within the past year the organization has published the sixteenth edition of its Nudist Park Guide, a 240-page book, listing information on and maps of the ASA's clubs and resorts. It is expected to sell over 20,000 copies through the ASA office, bookstores, and distributors. It can be found in many public libraries, including the Farber Library in North Hampden, Massachusetts, and Springfield City Library, in Springfield, Massachusetts. In addition, an illustrated monthly tabloid newspaper is sent to members and other interested parties. The organization also prints various brochures explaining aspects of social nudism and delineating some of the history of the movement. (To illustrate this function, the ASA's current public relations brochure is appended as Appendix B.)

In 1987, the ASA produced and copywrited two video tape films. One is Welcome to Our World (ASA 1987), a twelve and one-quarter minute introductory program designed for

presentations to organizations, service groups, trade fairs, travel agents and the like. The other is a thirty-minute entertainment video, for which arrangements are presently being made for commercial distribution. Let Yourself Be Free (ASA 1988). All these publications use film and photographic portrayal of social nudism with men, women, and children in the nude to show activities at our clubs and at certain beach locations traditionally used by nudists.

In addition, many of the organization's member clubs publish their own brochures or other promotional materials, along with club newsletters directed to the members of that club and prospective members in given locales. Many clubs place their brochures and literature with travel bureaus, chambers of commerce, and other information centers and locations of public interest.[7]

We believe that wholesome photographic portrayal of the nude form is essential to the education of the general public and to the documentation of the nudist movement, and that such photography is protected by the First Amendment to the Constitution of the United States. We express our concern and disagreement with broad-brush lawmaking illustrated by Massachusetts's attempt to criminalize portrayals, or consent thereto, of "a child in a state of nudity." Mass. Gen. L. ch. 272, §29A (1986). Without the kind of declaration of unconstitutionality of this statute as rendered by the court below, production of the nudist materials

7 The American Sunbathing Association is not the only publisher of nudist literature. The Naturist Society (P.O. Box 132, Oshkosh, Wisconsin 54902) publishes an attractive quarterly magazine entitled Clothed With the Sun: A Journal of the Clothes Optional Lifestyle. The same organization is likewise responsible for publication of the most popular guide to nudist opportunities throughout the world. L. Baxandall, World Guide to Nude Beaches and Recreation (Crown, 2d ed. 1983). There are currently in print at least eight entertainment video tapes reflecting the nudist or naturist lifestyle around the world, as well as nine books and four other magazines available in the North American markets.



described above could not occur in Massachusetts, nor could any of our 591 members there take a family snapshot which includes nude children. The effect of the Massachusetts statute is to ignore the well-established traditions and principles of nudists, as well as to impair or chill the ability of the ASA itself to further its goals and educate the public about social nudism.

Since nudity is not equated with obscenity,[8] our courts have wisely followed a course of defining that kind of nudity which may be offensive in terms of *sexually overt actions*, *e.g.*, "lewd exhibition of the genitals," "exhibition calculated to offend or affront," and the like.[9] This long-accepted distinction is important to nudist families. If, by error or zeal, the distinction between nude and lewd were to be ignored or done away with, the "body taboo" believed in by others would seem real to our nudist children, threatening the healthy outlook they grow up with.

The interest and concern of your *amicus curiae* stems from the following facial reading of the Massachusetts statute:

> Whoever with knowledge that a person is a child under eighteen years of age, or whoever while in possession of such facts that he should have reason to know that such person is a child under eighteen years of age, hires, . . . solicits or . . . employs, procures, uses, causes, encourages, or knowingly permits such child to pose or be exhibited in a state of nudity . . . for purpose of visual representation or reproduction in any book, magazine, pamphlet, motion picture film, photograph, or picture shall be punished . . . .

8 *Erznoznik v. City of Jacksonville*, 422 U.S. 205 (1975); *Jenkins v. Georgia*, 418 U.S. 372 (1974); *Sunshine Book Co. v. Summerfield*, 355 U.S. 372 (1958); *New York v. Ferber*, 458 U.S. 747, 765-66 at n.18 (1982).

9 *E.g.*, *United States v. Various Articles of Obscene Merchandise*, 460 F. Supp. 826, 830 (S.D.N.Y. 1978).

> It shall be a defense . . . that such visual representation or reproduction of any posture or exhibition in a state of nudity was produced, . . . for a bona fide scientific or medical purpose, or for an educational or cultural purpose for a bona fide school, museum or library.

Mass. Gen. L. ch. 272, §29A (1986) quoted in *Commonwealth v. Oakes*, 401 Mass. 602, 603 n.1, 518 N.E.2d 836, 837 n.1 (1988). Nudity is further defined in Mass. Gen. L. ch. 272, §31 (1986). The ASA, its affiliated clubs and members, and other nudists in North America do not fit within any of the stated exceptions.

The interest and position of the *amicus* is in support of the majority opinion below. The filing of this brief *amicus curiae* has been consented to by counsel for the Petitioner and Respondent.

## SUMMARY OF ARGUMENT

### Introduction

We recognize that the Massachusetts legislature, in an apparent attempt to conform §29A to the decision of the Massachusetts Supreme Judicial Court, amended the statute to add additional qualifying terms to the blanket prohibition on child nudity. There is still some reason for concern as to the vagueness of the terminology used in the amendment. Whatever the effect of that amendment may be, we submit that useful bright lines should be drawn as guidelines in an area apparently left subject to troublesome interpretation of the earlier decisions of this Court. (Pages 10-12)



I

It appears that a misunderstanding of this Court's previous decisions led the Massachusetts lawmakers to draft an overly broad law seeking to prohibit the pictorial rendition of nude persons under the age of eighteen. This law was drawn in connection with other prohibitions *properly* aimed at the criminal regulation of child pornography. And while numerous examples of case-by-case analysis provide some assurance that courts are generally able to make apparently sound distinctions between innocent nudity and exploitative material, there are instances in which genuine concern arises. The impact of the censor on the photographer is real, substantial, and serious. Case-by-case analysis does not address the chilling effect of a statute that prevents people from otherwise engaging in lawful protected expression. (Pages 12-16)

II

Historically, court decisions in this country, including those of this Court, have upheld the right of nudists to express their belief, in all manner of media, that the unclothed body is not an object of shame, nor is it, in the context of social nudism, sexual. Nudity alone has been held not to be illegal conduct. The choice of a nudist lifestyle and the visual portrayal thereof is a fundamental liberty entitled to protection under the First Amendment.

The Massachusetts statute, prior to amendment, overbroadly attempted to regulate all child nudity without regard to the activity engaged in by the child. As such, the statute failed to account for the nudist family snapshot. The interests of these families and of the ASA as their principal spokesman are seriously compromised by the uncertainty created by such broad legislation. (Pages 16-20)

III

It is more effective, honest, and protective of everyone's liberties and best interests to require that state laws regulating child pornography target the exploitative and sexual aspects of that evil directly rather than seek the expediency of totally banning the portrayal of nudity. In this manner, the offensive conduct itself can be isolated and appropriately prosecuted. This Court's decisions have never indicated that the portrayal of child nudity was itself in any way pornographic or subject to the per se prohibitions the court below found so troublesome.

If we fail to focus diligently upon the actual problem at hand, we risk diluting resources which must be marshalled to the real task of protecting children. Nudist children do not need uninformed protection, nor should any portion of the public be required to speculate about the legality of their conduct in composing a visual portrayal of children. (Pages 20-22)

## ARGUMENT

## INTRODUCTION

Following the Massachusetts Supreme Judicial Court's decision in *Commonwealth v. Oakes*, 401 Mass. 602, 518 N.E.2d 836 (1988), *cert.granted*, 108 S. Ct. 1994 (1988) (No. 87-1651), the state legislature amended the statute in question in an apparent effort to confine the statute's reach to sexually oriented exploitation of minors. The amendment was the addition of a qualifying phrase, "with lacivious intent." (H.B. 5555, 1988 Mass. Acts ___ reprinted as Appendix A.)[10] Without expressing any opinion as to the constitu-

10 A statute substantially similar to that here under consideration has been *judicially construed* to require that prohibited child nudity include "a lewd exhibition or . . . graphic focus on the genitals." *State v. Young*, 37 Ohio St. 3d 249, ___ N.E.2d, ___ 1988 Ohio LEXIS 213 (July 6, 1988).



tionality of the amended statute,[11] your *amicus* urges the affirmance of the decision below in order to clarify this Court's previous holdings that nudity in its visual and photographic portrayal, even of minors, is not obscene and therefore may not, without more, be the subject of criminal prosecution. This Court can provide useful guidance in the form of a finding and declaration that the Massachusetts statute, prior to its amendment, carried the regulation of protected expression too far.[12]

The question presented in this writ of certiorari[13] appears to address the method of constitutional construction, in light of First Amendment concerns, engaged in by the Massachusetts court. Accordingly, your *amicus* anticipates that the litigant parties will address, on the merits, the detailed and sometimes intricate issues of First Amendment overbreadth. *Broadrick v. Oklahoma*, 413 U.S. 601 (1973); *Boos v. Barry*, 108 S. Ct. 1157 (1988); *City of Houston v. Hill*, 107 S. Ct. 2502 (1987). Your *amicus* therefore will leave the bulk of such a discussion to those parties in order to more clearly set forth its particular interest as a friend of this Court. That interest would support a decision, however analytically arrived at, that the Massachusetts statute was

11 The definition supplied for "lacivious intent" as set forth in Section 31 of H.B. 5555 (Appendix A) leaves ample room to question the precision of the law and its possible interpretations. What, for example, is meant by the term "deviation from accepted customs and manners" as set forth in subsection (1)? Similarly, subsection (4) provides by way of suggested interpretation "whether the child is depicted in an unnatural pose or inappropriate attire considering the child's age." It is submitted that nearly all children roughhouse, play dress-up and occasionally run around without clothes.

12 This occasion marks the first opportunity in thirty years for the Court to address the specific constitutional rights of a significant minority of concerned citizens. *Sunshine Book Co. v. Summerfield*, 355 U.S. 372 (1958).

13 "Does possible application of a criminal statute designed to prevent sexual abuse and exploitation of children to marginal conduct arguably protected by First Amendment justify court in invalidating entire statute on overbreadth grounds and reversing defendant's conviction without deciding whether defendant's actions, were within statute's substantial legitimate reach?" 56 U.S.L.W. 3801 (U.S. May24, 1988).

indeed facially overbroad, *see New York v. Ferber*, 458 U.S. 747, 774-76 (1982) (O'Connor, J. concurring), and that it would "significantly compromise First Amendment protections of parties not before the Court. . . ." *City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 801 (1984) (citing *Erznoznik v. City of Jacksonville*, 422 U.S. 205 (1975)).

## I. NUDITY ALONE, EVEN OF MINORS, CANNOT CONSTITUTIONALLY BE REGULATED AS OBSCENITY, NOR WILL CASE-BY-CASE ANALYSIS PREVENT THE CHILLING EFFECT ON FIRST AMENDMENT RIGHTS.

The Massachusetts legislature may have sought to curtail the *existence* of literature which has a presumed appeal to persons who take a deviant sexual interest in children.[14] Such arguably worthy motives have left a much too widely drawn net in which to also snare activity which is both legitimate and constitutionally protected. While the example given in the opinion below might be obvious, it is apt; many others are available from the developed case law. *See* discussion at Part II, *infra*.

The statute in question appears to have originated from a misunderstanding of this Court's holding in *New York v. Ferber*, 458 U.S. 747 (1982). The lawmakers may have believed that because the broad message of *Ferber* is that states will be allowed more latitude in regulating obscenity which uses and exploits children than is permitted by the

14 It should be noted that photos of nude children are far from the only sources of stimulation for pedophiles. The experts note that also appealing are voices, stories, diaries and even children in clothing and underwear advertisements found in newspapers and store catalogues. *Effect of Pornography on Women and Children, Hearings Before the Subcomm. on Juvenile Justice of the Senate Comm. on the Judiciary*, 98th Cong., 2d Sess. (1984) (statement of Kenneth Lanning, Behavioral Science Unit, Federal Bureau of Investigation) 38.



"hard core" standard established for adults in *Miller v. California*, 413 U.S. 15 (1973), states are therefore free to engage in virtually any regulation regarding the visual depiction of children, including laws which would supress simple nudity. But in *Ferber* this Court took considerable care to aim only at the subject of sexual content, both as to the images produced and to the intended audience. 458 U.S. at 764-65. *Ferber* reiterated the long standing principle that "nudity, without more, is protected expression," *citing Erznoznik v. City of Jacksonville*, 422 U.S. at 213. As Justice O'Connor cautioned:

> On the other hand, it is quite possible that New York's statute *is* overbroad because it bans depictions that *do not actually threaten the harms identified* by the Court. For example, clinical pictures of adolescent sexuality, such as those that might appear in medical textbooks, might not involve the type of sexual exploitation and abuse targeted by New York's statute. Nor might such depictions feed the poisonous "kiddie porn" market that New York and other States have attempted to regulate. Similarly, pictures of children engaged in rites *widely approved by their cultures*, such as those that might appear in issues of *National Geographic*, might not trigger the compelling interests identified by the Court.

*Ferber*, at 775. (emphasis added).

While *Ferber* has been criticized for "leaving unanswered precisely how to determine what speech is unprotected," Note, *The Supreme Court 1981 Term* (pt. E), 96 Harv. L. Rev. 141, 145 (1982), this Court reasoned that such decisions could be made on a case-by-case analysis. *New York v. Ferber*, 458 U.S. at 773-774; *Broadrick v. Oklahoma*, 413

U.S. at 610-16 (1973). And, case-by-case analysis has occurred. *E.g.*, *United States v. Flippen*, 674 F. Supp. 536, 542 (E.D. Va. 1987) ("All other evidence offered by the Government is probably inadmissible. . . . Gov. Exs. 13A, 15-27 are magazines that contain pictures of nude children, often playing at nude beaches or nude resorts, but the children are not engaged in any sexual activities.") *See also United States v. Wiegand*, 812 F.2d 1239 (9th Cir. 1987), *aff'g* 636 F. Supp. 828 (S.D. Cal. 1986), *cert. denied*, 108 S. Ct. 164 (1987); *United States v. Andersson*, 803 F.2d 903 (7th Cir. 1986), *cert. denied*, 107 S. Ct. 962 (1987); *United States v. Tolczeki*, 614 F. Supp. 1424 (N.D. Ohio 1985); *In re Duncan*, 189 Cal. App. 3d 1348, 234 Cal. Rptr. 877 (1987), *cert. denied*, 108 S. Ct. 501 (1987); *State v. Jordan*, 665 P.2d 1280 (Utah 1983), *appeal dismissed*, 464 U.S. 910 (1983); *Griffin v. State*, 396 So. 2d 152 (Fla. 1981).

But the price of such case-by-case analysis to mothers, fathers, and stepfathers may also be the risk of serious criminal charges for taking nude pictures of their children. Their concerns are both real and substantial. *See People v. Lerch*, 91 Ill. Dec. 402, 483 N.E.2d 888, *aff'g* 134 Ill. App. 3d 643, 480 N.E.2d 1253 (1985); *State v. Robinson*, 28 Ohio St. 3d 65, 502 N.E.2d 634 (1986); *Bach v. Commonwealth*, 703 S.W.2d 489 (Ky. App. 1985). Consequently, case-by-case analysis will not solve the chilling effect of statutes such as Mass. Gen. L. ch. 272, §29A (1986). *E.g.*, *Secretary of State of Maryland v. Joseph H. Munson Co.*, 467 U.S. 947 (1984). Where the proscription is absolute, case-by-case analysis is impossible. *Sunshine Book Co. v. Summerfield*, 355 U.S. 372 (1958).

Your *amicus* has no quarrel with the definition of unprotected speech chosen by New York and approved in



*Ferber*, 458 U.S. at 764, and we earnestly hope that the commentator is correct in his analysis that:

> The language and citations employed by the Court help to illuminate the contours of the new category of unprotected speech; both suggest that the category comprises only hard-core pornography that sexually exploits minors. The Court's use throughout the opinion of the term "child pornography" to refer to the material at issue, its citation to medical periodicals that address sexual abuse and exploitation, and its acknowledgement that the New York statute is directed at hard-core child pornography indicate that the category of unprotected speech is restricted to abusive and exploitative material. Seen against the background of the Court's overbreadth analysis, this limitation suggests that *Ferber* should not be read to give a green light to states to prohibit distribution of all material depicting sexual conduct by children.

Note, *The Supreme Court 1981 Term* at 148-49 (footnotes omitted). We submit that nudity of children is not sexual conduct, except in the minds of those who believe all nudity is inherently sexual.[15]

This Court, in *Ferber*, sought to square the notion that certain hard-core dynamics expounded upon in *Miller* were

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15 There may even be some reason to question the magnitude of the evils. A three-year investigation by the State of Illinois concluded that after certain amendments to federal law encompassed in the Protection of Children Against Sexual Exploitation Act of 1977, 18 U.S.C. §§2251-2256, domestic commercial child pornography had become extinct and what little remained was a pathetic underground of amateurs who preserved old pictures. These findings were corroborated by the Federal Bureau of Investigation. Ill. Legis. Investigating Comm., Sexual Exploitation of Children, A Report to the Illinois General Assembly 14 (1980). *See also* Note, *supra* note 52, at 149. Between January 1, 1978, and May 21, 1984, there were a total of sixty-four federal convictions for child pornography. Senate Comm. on Govt'l. Affairs. Perm. Investigations Subcomm. (99 Cong. 2d Sess., Rep. No. 99-537), Report, Child Pornography and Pedophilia 5-6 (1986).

not the only forms of prohibited *sexual* expression when persons under the age of consent were portrayed. The New York statutes evaluated in *Ferber* left no doubt that their sole and relatively well-focused aim was pornography, in particular that which *in and of itself* constitutes abuse of children. *New York v. Ferber*, 458 U.S. at 751.

The fundamental error in the Massachusetts statute is the absolute ban on the photographic portrayal of child nudity, which nudity is not, as defined, sexual, let alone obscene, lewd, pornographic, or exploitative. This Court has rejected such a doctrine. *Erznoznik v. City of Jacksonville*, 422 U.S. 205 (1975); *Jenkins v. Georgia*, 418 U.S. 153 (1974).

## II. VISUAL PORTRAYAL OF THE FAMILY NUDIST LIFESTYLE IS PROTECTED EXPRESSION.

Nudist publications and literature have a judicial and constitutional history which somewhat parallels the growth of the movement in America itself. In 1940, Dr. Maurice Parmelee, a pioneer nudist and member of the ASA Hall of Fame, saw his book, Nudism in Modern Life (1931), subject to a libel action upon its importation into the United States. The libel finding was reversed and importation allowed in an historical and scholarly opinion. *Parmelee v. United States*, 113 F.2d 729 (D.C. Cir. 1940).

The efforts of the ASA to send its own magazine through the mails followed a more tortuous route, ultimately culminating in this Court's decision in *Sunshine Book Co. v. Summerfield*, 355 U.S. 372 (1958), *rev'g* 249 F.2d 114 (D.C. Cir. 1957), *aff'g* 128 F. Supp. 564 (D.D.C. 1955), *on remand*, 184 F. Supp. 767 (D.D.C. 1960).[16] *See, e.g., City of Chicago v.*

16. Legal success was its own undoing for the ASA's magazine Sunshine and Health. Pictures of nudists and "volleyball results" joked about by surgeon Hawkeye Pierce on the television series "M.A.S.H." could no longer compete on the curiosity level with the likes of Playboy. Present day nudist literature such as described above must and does succeed on the merits and interest of the subject itself.



Geraci, 46 Ill.2d 576, 264 N.E.2d 153 (1970) (nudist magazine protected expression); *Home Box Office, Inc. v. Wilkinson*, 531 F. Supp. 987 (D. Utah 1982) (state may not ban nudity from cable television); *United States v. Various Articles of Obscene Merchandise*, 460 F. Supp. 826 (S.D.N.Y. 1978) (separating nudist literature from adult pornography); *United States v. Central Magazine Sales, Ltd.*, 381 F.2d 821 (4th Cir. 1967) (per curiam), *aff'g United States v. A Shipment of 25,000 Magazines*, 254 F. Supp. 1014 (D. Md. 1966) (same; materials included nudist literature). In the same vein as *Sunshine Book Co., supra*, also involving nudist literature, are *Felton v. City of Pensacola*, 390 U.S. 340 (1968) and *Rosenbloom v. Virginia*, 388 U.S. 450 (1967). *See also Smith v. State*, 413 N.E.2d 652 (Ind. App. 1980), where the court noted in tracing these developments:

> Whatever may in general be considered pornography or "hard core" obscenity under the test thus established by the United States Supreme Court, it does seem clear, pursuant to that Court's guidelines, that "nudity alone is not enough to make material legally obscene." *Jenkins v. Georgia*, *supra* 418 U.S. at 161. *And see, e.g.*, nudist magazine cases such as *Sunshine Book Co. v. Summerfield*, 355 U.S. 372, 78 S. Ct. 365, 2 L.Ed.2d 352 (1958), in which the Court held nudist magazines available to the general public were not obscene for purposes of federal postal legislation, despite the appearance therein (as noted by the lower court) of "photographs of naked, men, women, and children," and, further, despite a determination by the Post Office Department fact-finder that such magazines could not be legally distributed. *Sunshine Book Co. v. Summerfield*, (D.C.Cir 1957) 249 F.2d 114.

> As noted above, the photograph in the instant case involves nothing more than nudity, in that it depicts neither sexually provocative gestures, nor any close-up of the genital region.

413 N.E.2d at 653. *Accord People v. Biocic*, 80 Ill App.2d 65, 224 N.E.2d 572 (1967) (nudist magazines).

The law has not for a long time ascribed any illegality to nudity alone absent circumstances or environments where *regulation* is otherwise appropriate. *Schad v. Borough of Mount Ephraim*, 452 U.S. 61 (1981); *American Booksellers Assoc., Inc. v. Hudnut*, 771 F.2d 323 (7th Cir. 1985), *aff'd*, 475 U.S. 1001 (1986); *Williams v. Kleppe*, 539 F.2d 803, 806-07 (1st Cir. 1976), *aff'g* 400 F. Supp. 122, 127 (D. Mass. 1975). *See also Craft v. Hodel*, 683 F. Supp. 289 (D. Mass. 1988), *appeal docketed*, No. 88-1438 (1st Cir. July 18, 1988). Whether that choice of lifestyle is exercised in the home, at a private nudist resort, or at a traditional nude beach, the practice of social family nudism is a protected and recognized choice by individuals who retain the fundamental liberty to be left alone by their government. *Bruns v. Pomerleau*, 319 F. Supp. 58 (D. Md. 1970). As Clare Boothe Luce is said to have observed, "[c]ensorship, 'like charity, should begin at home; but unlike charity, it should end there.'" Quoted in *Faloona v. Hustler Magazine, Inc.*, 607 F. Supp. 1341, 1361 (N.D. Tex. 1985), *aff'd*, 799 F.2d 1000 (5th Cir. 1986), *cert. denied*, 107 S. Ct. 1295 (1987).

Rather than target criminal behavior, abuse and exploitation as is the case in nearly every other state, as well as federal, statutory scheme (*see New York v. Ferber*, 458 U.S. at 749-750 n.2), the prior Massachusetts statute rested upon the unsupportable expedient of banning child nudity itself. Statutes such as those examined in *Ferber*, on the



other hand, provide tried and true methods of directly attacking and prosecuting the evils to which they are directed. *See, e.g., United States v. Various Articles of Obscene Merchandise*, 460 F. Supp. 826 (S.D.N.Y. 1978); *State v. Jordan*, 665 P.2d at 1284 (Utah 1983) (distinguishing mere nudity from child pornography); *Freeman v. Commonwealth*, 233 Va. 301, 288 S.E.2d 461 (1982) (child pornography statute construed to require *lewd exhibition* of a child's genitals); *Goodmakers v. State*, 450 So. 2d 888 (Fla. App. 1984) (nudity distinguished from lewd exhibition).

Our courts have wisely followed a course of carefully defining the offensive by virtue of *acts* which offend, retaining a scienter requirement expressed in language such as that which proscribes "lewd exhibition of the genitals," "exhibition calculated to offend or affront," and the like. *E.g., United States v. Various Articles of Obscene Merchandise*, 460 F. Supp. 826 (S.D.N.Y. 1978). Nudists view these accepted qualifications to be critically important to the protection of our lifestyle and to the protection of our children, their health and well-being. The Massachusetts statute stigmatizes nudity in a way nudist families find unacceptable. Such a law fails to take into account and allow for very real differences of attitude and intent which surround the photographic creation on the part of both the photographer and his or her subject. *See Faloona v. Hustler Magazine, Inc.*, 607 F. Supp. 1341 (N.D. Tex. 1985), *aff'd*, 799 F.2d 1000 (5th Cir. 1986), *cert. denied*, 107 S. Ct. 1295 (1987); *Lerman v. Flynt Distributing Co., Inc.*, 745 F.2d 123 (2d Cir. 1984), *cert. denied*, 471 U.S. 1054 (1985). *Cf. Shields v. Gross*, 58 N.Y.2d 338, 448 N.E.2d 108 (1983). And, as Justice Rhenquist pointed out, "[I]t would be wholly at odds with . . . *Miller* to uphold an obscenity conviction based upon a defendant's depiction of a woman with a bare midriff, even

though a properly charged jury unanimously agreed on a verdict of guilty." *Jenkins v. Georgia*, 418 U.S. at 161.

Massachusetts's attempt to categorize the visual portrayal of child nudity as unprotected expression is unwise as well as unconstitutional. The New York statute in *Ferber* contained exceptions for medical and artistic works which are broader than those provided for by Massachusetts. The reason this Court did not invalidate the New York law was because that statute was still narrowly and carefully directed at pornographic, exploitative material and *its boundaries would not be extended*. *New York v. Ferber*, 458 U.S. at 773. Perhaps the *Ferber* majority's most important point is the following: "Nor will we assume that New York courts will widen the possibly invalid reach of the statute by giving an expansive construction to the proscription on 'lewd exhibition[s] of the genitals.'" *Id.* This cautionary assumption is completely ignored by the prior version of §29A, which also left no "alternative channels" for legitimate photographic expression. *Arcara v. Cloud Books, Inc.*, 478 U.S. 697 (1986).

## III. STATUTES PROSCRIBING NUDITY OF CHILDREN MUST TARGET SEXUAL CONDUCT OR EXPLOITATION.

The statute declared unconstitutional below demonstrates a serious additional problem. Lacking a clear focus on sexual exploitation, it invites a substantial risk of diluting resources and diverting attention from the serious matters of real abuse which everyone agrees should be addressed. *See generally* Besharov, *"Doing Something" About Child Abuse: The Need to Narrow the Grounds for State Intervention*, 8 Harv. J. L. & Pub. Pol'y 539, 555 (1985) ("While trying to protect maltreated children, society must protect the traditional American values of personal freedom



and due process.") and 567-72. *See also* statement of Kenneth Lanning, *supra*, note 14, at 31:

> Senator Specter. And by sexually explicit you mean what?
>
> Mr. Lanning. The biggest problem area that you have in defining sexually explicit is simple nudity. It would probably have to be more than simple nudity. It would involve sexual conduct . . . .

Indeed if the Petitioner means what it says that "it is not necessary to rely on a mere 'hunch' that the state will '*probably* not enforce' the statute against individuals who take innocuous photographs" (Brief for Petitioner at 30 n.29 [emphasis added] and Appendix),[17] then a more narrowly focused statute can be just as effective as ever and the Petitioner need not campaign for reinstatement of the previous version of the law. Your *amicus* welcomes such assurance, believing that the same would apply to the interests set forth herein. If, on the other hand, the State seeks to reinstate a mandatory outright ban on all child nudity as an expedient to its prosecutions, then this Court must stay the hand of the censor to prevent the chilling effect of such impermissible restraint. *See Secretary of State of Maryland v. Joseph H. Munson Co.*, 467 U.S. 947, 964-68; *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 607 (1982).[18]

---

17 Such assurances seem disingenuous at best in light of Petitioner's bald assertions contained in Part II B of its Brief, that "the production of photographs that depict children . . . posed in a state of nudity is sexual exploitation" (Brief for Petitioner at 18) or "regardless whether the photograph depicts actual sexual activity or the exhibition of a child nude, a child . . . has been victimized." *Id.* at 20. One wonders then about the fate of Edward Weston's justifiably famous photograph of his son Neil. Would this, too, be banned in Boston? 1 E. Weston, Daybooks at Plate 20 (Aperture 1973).

18 This is also not to say that this *amicus* necessarily agrees with the state's assertion that the Court may rely upon the history of enforcement of this kind of statute for its constitutional salvation. *Freedman v. Maryland*, 380 U.S. 51 (1965). *Cf. Frisby v. Schultz*, 56 U.S.L.W. 4785 (U.S. June 29, 1988).

The Massachusetts statute places the burden upon individual members of the public to guess whether their behavior is innocent or felonious. When nudity itself is prohibited or substantially conditioned, the statute no longer affects either the simplest photographs or great artistic works by accident, but reaches families and their friends who have taken vacation snapshots to the drug store. The state must therefore be held to the constitutional requirement, unchanged by *Ferber*, that "[n]o one will be subject to prosecution for the sale or exposure of obscene materials unless these materials depict or describe patently offensive 'hard core' sexual conduct." *Miller v. California*, 413 U.S. at 27.



## CONCLUSION

For the reasons set forth herein, your *amicus curiae* respectfully submits that the Supreme Judicial Court of Massachusetts properly declared the statute in question unconstitutional and its decision should be affirmed.

Respectfully submitted,

ROBERT T. PAGE*
General Counsel for the American
Sunbathing Association, Inc.

540 Steele Park Building
50 South Steele Street
Denver, Colorado 80209
Telephone: (303) 393-0433

American Sunbathing Association, Inc.
1703 North Main Street
Kissimmee, Florida 32743
(407) 933-2064

*Counsel of Record

DATED: 9-14-88

# APPENDIX A

## HOUSE—No. 5555

## THE COMMONWEALTH OF MASSACHUSETTS

---

In the Year One Thousand Nine Hundred and Eighty-Eight.

---

ACT RELATIVE TO CHILD SEXUAL EXPLOITATION.

*Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:*

SECTION 1. Chapter 272 of the General Laws as appearing in the 1986 Official Edition, is hereby amended by striking out section 29A, and inserting in place thereof the following section: —

Section 29A. Sexual Exploitation of Children.

(a) Whoever, either with knowledge that a person is a child under eighteen years of age or while in possession of such facts that he should have reason to know that such person is a child under eighteen years of age, and with lascivious intent, hires, coerces, solicits or entices, employs, procures, uses, causes, encourages, or knowingly permits such child to pose or be exhibited in a state of nudity, for the purpose of representation or reproduction in any visual material, shall be punished by imprisonment in the state prison for a term of not less than ten nor more than twenty years, or by a fine of not less than ten thousand dollars nor more than fifty thousand dollars, or by both such fine and imprisonment.

(b) Whoever, either with knowledge that a person is a child under eighteen years of age or while in possession of such facts that he should have reason to know that such person is a child under eighteen years of age, hires, coerces, solicits or entices,employs, procures, uses, causes, encourages, or knowingly permits such child to participate or engage in any act that depicts, describes, or represents sexual conduct for the purpose of representation or reproduction in any visual material, or to engage in any live performance involving sexual conduct, shall be punished by imprisonment in the state prison for a term of not less than ten nor more than twenty years, or by a fine of not less than ten thousand dollars nor more than fifty thousand dollars, or by both such fine and imprisonment.

(c) In a prosecution under this section, a minor shall be deemed incapable of consenting to any conduct of the defendant for which said defendant is being prosecuted.

(d) For the purposes of this section, the determination whether the person in any visual material prohibited hereunder is under eighteen years of age may be made by the personal testimony of such person, by the testimony of a person who produced, processed, published, printed or manufactured such visual material that the child therein was known to him to be under eighteen years of age, or by expert medical testimony as to the age of the person based upon the person's physical appearance, by inspection of the visual material, or by any other method authorized by any general or special law or by any applicable rule of evidence.

(e) The provisions of this section are severable, and if any of its provisions shall be held unconstitutional by any court of competent jurisdiction, the decision of such court shall not impair any of the remaining provisions.

SECTION 2. Chapter 272 of the General Laws as appearing in the 1986 Official Edition, is hereby further amended by striking



out section 29B, and inserting in place thereof the following section: —

Section 29B. Dissemination of Visual Material Involving Sexual Exploitation of Children.

(a) Whoever, with lascivious intent, disseminates any visual material that contains a representation or reproduction of any posture or exhibition in a state of nudity of a child who is under eighteen years of age, knowing the contents of such visual material or having sufficient facts in his possession to have knowledge of the contents thereof, or has in his possession any such visual material knowing the contents or having sufficient facts in his possession to have knowledge of the contents thereof, with the intent to disseminate the same, shall be punished in the state prison for a term of not less than ten nor more than twenty years or by a fine of not less than ten thousand dollars nor more than fifty thousand dollars or three times the monetary value of any economic gain derived from said dissemination, whichever is greater, or by both such fine and imprisonment.

(b) Whoever disseminates any visual material that contains a representation or reproduction of any act that depicts, describes, or represents sexual conduct participated or engaged in by a child who is under eighteen years of age, knowing the contents of such visual material or having sufficient facts in his possession to have knowledge of the contents thereof, or whoever has in his possession any such visual material knowing the contents or having sufficient facts in his possession to have knowledge of the contents thereof, with the intent to dissiminate the same, shall be punished in the state prison for a term of not less than ten nor more than twenty years or by a fine of not less than ten thousand dollars nor more than fifty thousand dollars or three times the monetary value of any economic gain derived from said dissemination, whichever is greater, or by both such fine and imprisonment.

(c) For the purposes of this section, the determination whether the child in any visual material prohibited hereunder is under eighteen years of age may be made by the personal testimony of such child, by the testimony of a person who produced, processed, published, printed or manufactured such visual material that the child therein was known to him to be under eighteen years of age, by testimony of a person who observed the visual material, or by expert medical testimony as to the age of the child based upon the child's physical appearance, by inspection of the visual material, or by any other method authorized by any general or special law or by any applicable rule of evidence.

(d) In a prosecution under this section, a minor shall be deemed incapable of consenting to any conduct of the defendant for which said defendant is being prosecuted.

(c) The provisions of this section are severable, and if any of its provisions shall be held unconstitutional by any court of competent jurisdiction, the decision of such court shall not impair any of the remaining provisions.

SECTION 3. Section 31 of Chapter 272 of the General Laws as appearing in the 1986 Official Edition, is hereby amended by inserting the following definition after the definition of "Knowing" and before the definition of "Minor": —

"Lascivious intent", a state of mind in which the sexual gratification or arousal of any person is an objective. For the purposes of prosecution under this chapter, proof of lascivious intent may include, but shall not be limited to, the following:

(1) whether the circumstances include sexual behavior, sexual relations, infamous conduct or a lustful or obscene nature, deviation from accepted customs and manners, or sexually oriented displays;



(2) whether the focal point of a visual depiction is the child's genitalia, pubic area, or breast area of a female child;

(3) whether the setting or pose of a visual depiction is generally associated with sexual activity;

(4) whether the child is depicted in an unnatural pose or inappropriate attire, considering the child's age;

(5) whether the depiction denotes sexual suggestiveness or a willingness to engage in sexual activity;

(6) whether the depiction is of a child engaging in or being engaged in sexual conduct, including, but not limited to, sexual intercourse, unnatural sexual intercourse, bestiality, masturbation, sado-masochistic behavior, or lewd exhibition of the genitals.

SECTION 4. Section 31 of Chapter 272 is hereby further amended by striking out the definition of "Minor", and inserting in place thereof the following definition: —

"Minor", a person under eighteen years of age.

SECTION 5. Section 31 of Chapter 272 is hereby further amended by striking out the definition of "Nudity", and inserting in place thereof the following definition: —

"Nudity", uncovered or less than opaquely covered human genitals, pubic areas, the human female breast below a point immediately above the top of the areola, or the covered male genitals in a discernibly turgid state. For purposes of this definition, a female breast is considered uncovered if the nipple or areola only are covered.

SECTION 6. Section 31 of Chapter 272 is hereby further amended by striking out the definition of "Visual material:, and inserting in place thereof the following definition: —

"Visual material", any motion picture film, picture, photograph, videotape, any book, magazine, or pamphlet that contains pictures, photographs or similar visual representations or reproductions. Undeveloped photographs, pictures, motion picture films, videotapes and similar visual representations or reproductions may be visual materials notwithstanding that processing, development or similar acts may be required to make the contents thereof apparent.

SECTION 7. Section 31 of Chapter 272 is hereby further amended by inserting the following definition after the definition of "Matter" and before the definition of "Sexual conduct": —

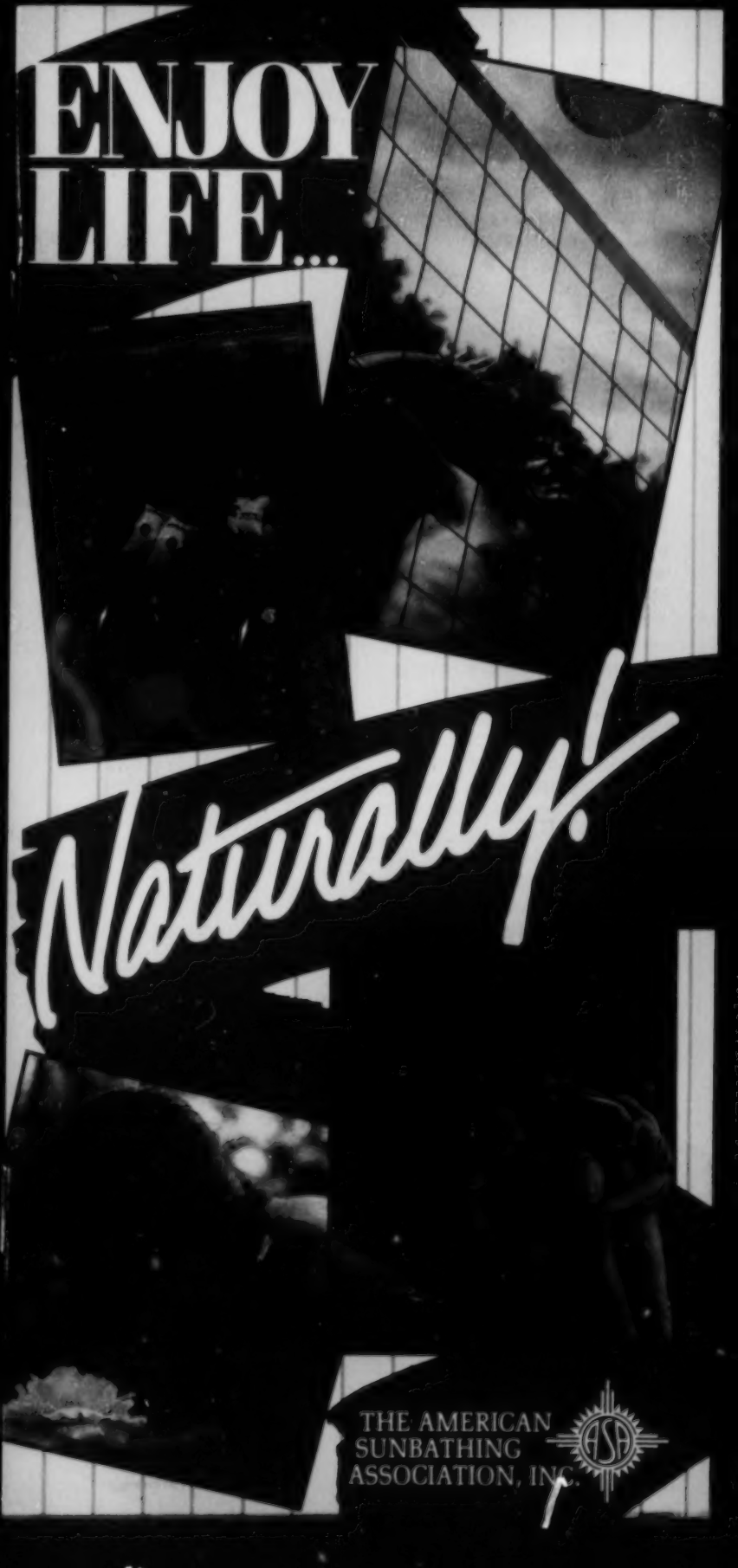
"Performance", any play, dance, exhibit, or such similar activity performed before one or more persons.

SECTION 8. Section 31 of Chapter 272 is further amended by striking out the definition of "Sexual conduct", and inserting in place thereof the following definition: —

"Sexual conduct", human masturbation, sexual intercourse, actual or simulated, normal or perverted, any lewd exhibitions of the genitals, flagellation or torture in the context of a sexual relationship, any lewd touching of the genitals, pubic areas, or buttocks of the human male or female, or the breasts of the female, whether alone or between members of the same or opposite sex or between humans and animals, and any depiction or representation of excretory functions in the context of a sexual relationship. Sexual intercourse is simulated when it depicts explicit sexual intercourse which gives the appearance of the consummation of sexual intercourse, normal or perverted.

SECTION 9. The provisions of this section are severable, and if any of its provisions shall be held unconstitutional by any court of competent jurisdiction, the decision of such court shall not impair any of the remaining provisions.

# APPENDIX B


ENJOY LIFE...
Naturally!
THE AMERICAN SUNBATHING ASSOCIATION, INC.
ASA

# WELCOME
## TO OUR WORLD

Of course you are curious about nudism. Most people are. This ASA publication has been designed to help you separate fact from fiction. It presents a true picture of nudism as it is enjoyed worldwide.

After having r… booklet, we ho… your family wh… our lovely reso… Right now, find… chair, take off y… have to start so… relax and learn… nudism.

The nudist phi… simple: being n… natural. Nudis… clothing rest… enjoy-ment of outdo… activities.

Nudists are not opposed to wearing clothes. There are many valid reasons for doing so. Protection against the weather is one. Another is for safety while working. Have you ever tried to fry bacon in the nude? Sanitation and adornment are other reasons for wearing something. Nudists do not (as some people believe) check their clothing at the gate. Simply put — "clothed when practical, unclothed when …

# …SM
## …EGINNING

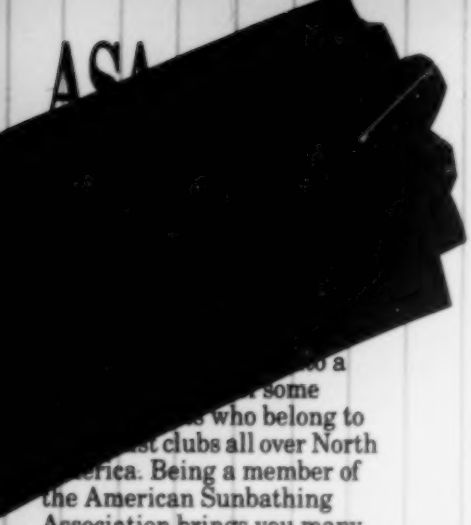
… New …mi-…el in …o …heard …e resolved …cation.

…urt and his wife located three other couples who had experienced Naturism in the Old Country. Together, they found an isolated spot upriver from New York City and on Labor Day of 1929, North American social nudism was born.

Later that year, Kurt formed "The American League for Physical Culture" which eventually became the American Sunbathing Association Inc. But, America was very conservative then and each nudist outing carried a real threat of being raided by local officers. The ASA spent much of its time and several thousands of dollars in the courts until finally in the late 50's it became safe to enjoy nudism at private parks. Still, today, the ASA retains attorneys to guard against infringements of your rights to enjoy nudism.

American nudism has changed dramatically from Kurt Barthel's original ideas of health, exercise and rigid diet. Today's nudist could simply be described as someone who enjoys outdoor recreation totally free of restrictive clothing. To relax and sunbathe nude is to let yourself free!

# ASA



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the American Sunbathing
Association brings you many
benefits. A few are listed below.

- The prestige of belonging to a strong national organization.
- A free subscription to *The Bulletin*, the ASA monthly newspaper.
- Protect from legal harassment while on ASA grounds.
- Discounts at ASA parks.
- Membership in the International Naturist Federation.
- Right to participate in the ASA annual and regional conventions which brings members together in an atmosphere of congeniality and athletic competition.

In addition the AS...

- Publishes a... *Guide* fo... nudi...

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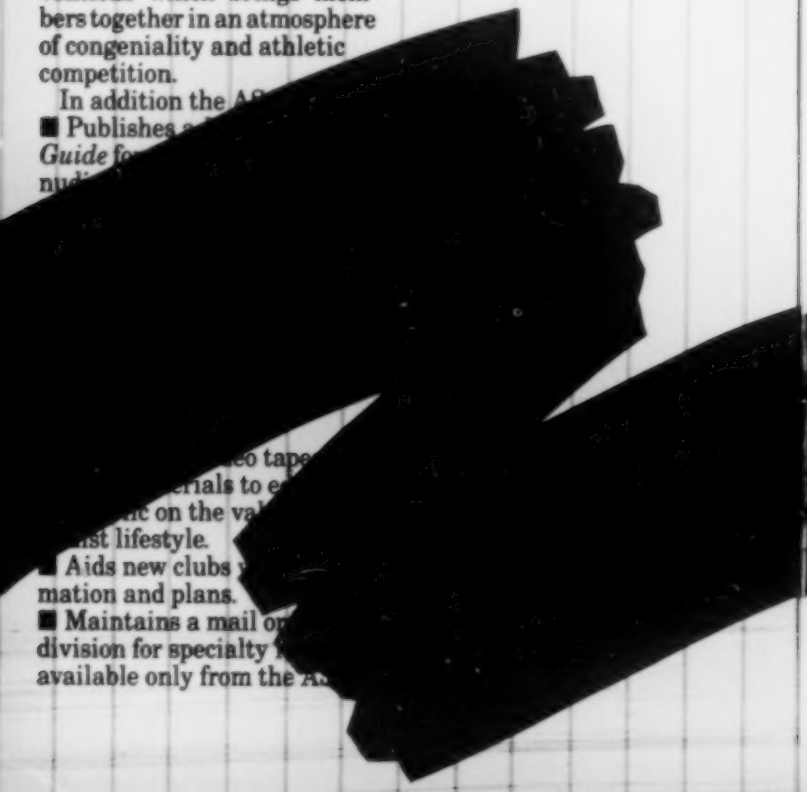
- Aids new clubs ... mation and plans.
- Maintains a mail or... division for specialty ... available only from the AS...



# ASA PARKS

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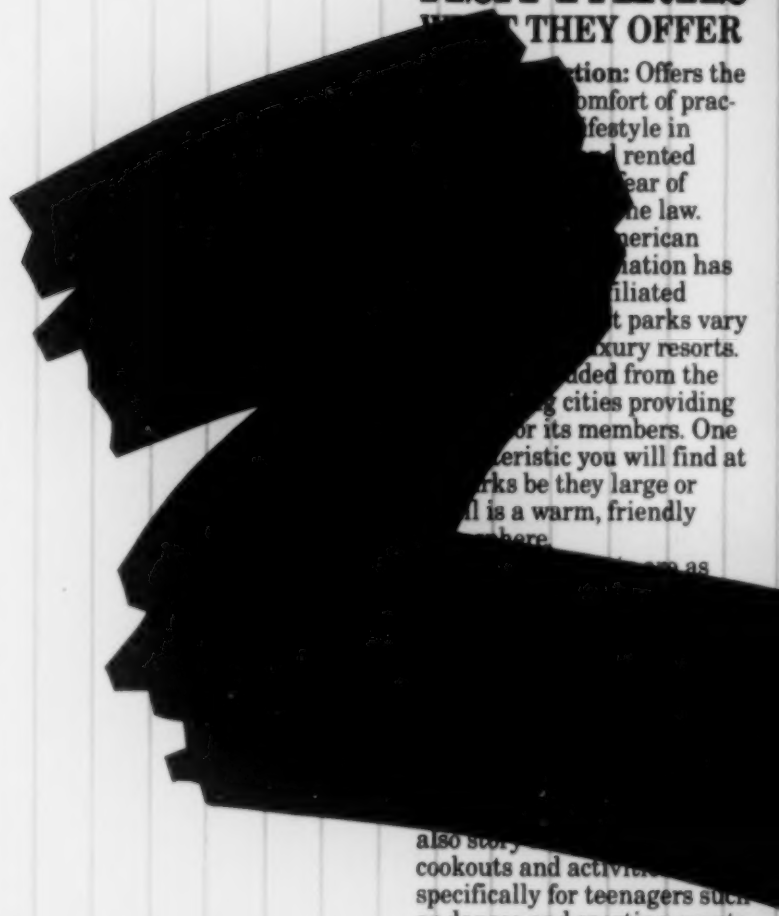


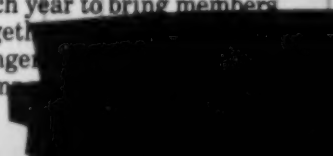
...m as ...
also story... cookouts and activi... specifically for teenagers such as dances and sporting events.

**Food:** A snack bar/restaurant is available at most parks for those without cooking facilities.

**...strooms/Showers:** Nudist ... provide clean restroom ...nower facilities.

**...n Facilities:** Nudist ... have overnight accom... ...ons that range from a ... motel type room to ...comfortable apartments. ...rks have tenting areas ...ost parks have facilities ... camping.

**Special Events:** Various special events are scheduled each year to bring members togeth... conge... com...



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not the "image" conveyed by
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**anded Clubs:**
n-landed clubs do not own or lease grounds. Members of non-landed clubs generally visit landed clubs as a group or hold social events, nude or clothed, at private homes, restaurants or entertainment centers. Some clubs have made arrangements with their Y.M.C.A. or Health Center for the purpose of holding swim events.

Non-landed clubs tend to be groups of friendly, congenial people who enjoy getting together to share their com-
– the nudist











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satisfied. They view their
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Nudism is a form of self-ex-
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this is "me" and I feel so good

# JOINT

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us at 17 St.,
Kissimmee,
32743-3396. W ill send you
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Next, you should contact a club near you and arrange for a visit. When writing a club, it is best to enclose a self-addressed stamped envelope for the club's use. If you decide to join that club your dues will include membership in both the National and Regional Associations. Also included at no additional cost will be your membership in the International Naturist Federation. At that time, you should receive from the clu
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office.

A Sponsor receives an iden
tification card, a copy of the current issue of the *ASA Park Guide*, and a one-year subscription to our monthly nudist newspaper, *The Bulletin*.

Although sponsor status does not guarantee access to all ASA nudist parks, it usually serves as an introduction to the club for the purpose of trial visits.

Should you later become a full member of the ASA, a pro-rated portion of the unused sponsor status will be refunded to you, up return of your
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# REGIONALS

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Murfreesboro, TN
**NORTHWEST SUN-BATHING ASSOCIATION**
2606 Third Street
Tillamook, OR 97141
**SOUTHWESTERN SUN-BATHING ASSOCIATION**
133
Point, TX 75169
**TERN CANADIAN**
**ATHING**
**CIATION**
, Station M
, AB, T2P 2K9
DA
**TERN SUNBATHING**
**CIATION**
Box 393
olton, CA 92324

# Q & A

## QUESTIONS AND ANSWERS

**Q: What special preparations should I make before visiting a nudist park?**

A: Generally none at all, apart from those you would normally make to go anywhere.

**Q: Are children likely to be shocked by their first sight of nudists?**

A: No. Children are natural nudists and usually take to it with minimum adjustment.

**Q: What should I bring?**

A: Bring towels, comfortable footwear, suntan lotion and sunglasses. You might also want to bring lounge chairs, a hat, something to read and any sporting equipment you desire.

**Q: What is the cost?**

A: This varies from park to

else will. Your personality will be noticed more than any scar.

**Q: My figure, to say the least, is less than perfect. Will I feel out of place?**

A: About one figure in twenty seen at a nudist park will be exemplary; the rest will be like people everywhere. Actually, a person's physical proportions mean less in nudist parks than they do elsewhere. Many nudists (male and female) will never take any prizes for physical beauty. Ladies

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or comment.

**Q: there any religious implications involved in nudism?**

A: None whatever. Nudists represent all major faiths most of the lesser

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nounce it themselves. No park will ever publicize your presence without your explicit permission.

**Q: Is it likely my wife would be improperly approached at a nudist park?**

A: Of course not. If such a thing were to occur, you'd notify the ma
onc

**visit the park without his/her spouse?**

A: This is rarely permitted. Family nudism is exactly that. Your first visit to a nudist park should be a shared experience.

**Q: Are unmarried adults eligible for membership?**

A: Yes, but individual parks have their own rules. It is best to check with them.

**Q: Will my picture be taken?**

A: Photogra

ide photo
where you can
ke all the pictures you wish of your own family.

**Q: Can I expect any real health benefits from nudism?**

A: Nudism embraces traditionally healthy activities such as swimming, hiking, volleyball, and outdoor living. Mental health is improved by the positive attitudes about self-image, healthy sexuality, relief from stress and just pl ation.

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making childbirth and breastfeeding more comfortable. Eyesight is improved by exposure to natural light. The body's circulation may be improved by the lack of constrictive clothing.

FILED
SEP 19 1988
JOSEPH F. SPANIOL, JR.
CLERK

(13)

NO. 87-1651

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1987

COMMONWEALTH OF MASSACHUSETTS,
*Petitioner,*

v.

DOUGLAS OAKES,
*Respondent.*

**On Writ of Certiorari to the Supreme Judicial Court of The Commonwealth of Massachusetts**

## BRIEF *AMICUS CURIAE* OF THE LAW & HUMANITIES INSTITUTE IN SUPPORT OF RESPONDENT

EDWARD DE GRAZIA
(Counsel of Record)
41 Fifth Avenue - 15B
New York, N.Y. 10003
(212) 260-6767
Attorney for *Amicus Curiae*

*Of Counsel*
Lawrence A. Stanley

CASILLAS PRESS, 1717 K STREET NW WASHINGTON DC 20036 — 223-1220

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In the

**SUPREME COURT OF THE UNITED STATES**

October Term, 1988

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NO. 87-1651

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**COMMONWEALTH OF MASSACHUSETTS,**

Petitioner,

v.

**DOUGLAS OAKES,**

Respondent.

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**BRIEF AMICUS CURIAE OF**
**THE LAW & HUMANITIES INSTITUTE**
**In Support of Respondent**

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## INTEREST OF AMICUS CURIAE AND PRELIMINARY STATEMENT

This brief is submitted with the written consents of the parties, on file with the clerk. The Law and Humanities Institute ("LHI") is a not-for-profit foundation concerned to strengthen the

interrelations between law and the humanities. To this end, LHI brings together lawyers, professors, literary critics, writers, and other creative artists to discuss common interests and problems.

An important feature of LHI's work is to monitor legal developments that may have importance for the free expression of creative artists and the artistic imagination. Thus LHI sponsors conferences, discussion groups and publications on law in literature and on the bearing of law on literary and artistic freedom. It also participates amicus curiae in selected court cases in the hope that it may be able to assist the courts to reach better-informed decisions on questions affecting literary and artistic freedom.

LHI views the Massachusetts statute being challenged in this case, and the con-



viction and sentencing of Respondent pursuant to that statute, with the utmost concern. Taken together, they represent a grave threat to the freedom of photographic expression and to parental rights and family privacies. For the first time known to us a "child pornography" law has been used to sentence a person to an extended prison term for taking "pin-up" photographs of his teen-aged stepdaughter in the family home. (Trial Exhibits 1-10). No evidence was introduced -- for none was needed to convict under the statute -- to show that this person's act was in any way or degree "sexually abusive," "exploitative" or otherwise harmful to the child, or intended to be. Such evidence as was introduced concerning his and his stepdaughter's motives signifies only that the furtherance of her young modeling career was uppermost

in both minds.

On this record, the Supreme Judicial Court of Massachusetts reversed Respondent's conviction and struck down the statute for being unconstitutionally overbroad. It did so out of its concern to protect from widespread infringement under the Massachusetts law the First Amendment rights of others--parents, photographers, and artists--who may also choose to make visual representations of children nude, or partially clad. Amicus believes that this is a vital right of all persons engaged in the visual arts, and all persons interested in what such arts can tell us about the human condition, including the children who become the subjects of photographs, films, and other artistic works.

Because the Massachusetts statute which was used to punish Respondent poses a seri-



ous threat to artistic freedom, and because we are persuaded that such a threat is unnecessary to the achievement of the legitimate goals of a "child pornography" law, LHI asks the Court to affirm the decision reached by the Supreme Judicial Court of Massachusetts in the interest of preserving the vital constitutional freedoms of speech and press for all.

## ARGUMENT

### I Photography is a vital medium of communication and means of expression. Nude children, as well as adults, have long provided important themes for photographers.

Ever since 1839 when the first photographic technique -- the daguerrotype -- was discovered by Louis-Jacques-Mandé Daguerre, photography has been a vital means

of communication and expression. Its social impact and importance has been immense. [Bourdieu, Un Art Moyen (1965); Freund, Photographie et societe (1974)]. It has been used to explore inner and outer worlds; the lives, loves and deaths of people, cities, countries, and cultures; and conditions of war, peace, health, wealth, poverty, work, play, happiness, age, youth, love, hate, desire, greed, beauty, and sex. [Szarkowski, Mirrors and Windows: American Photography Since 1960 (1978); Green, American Photography: A Critical History from, 1945 to the Present (1984); Szarkwoski, "Photography and the Mass Media," Aperture, Vol. 13, No. 13, (1967).] Probably more has been said about what is happening in the world in human terms, through the works of photographers, than it is possible for words to describe.



In 1840, the year after Daguerre perfected his historic technique, another Frenchman, Noel Lerebours, took the first nude photographs. These were mostly used by painters for reference. [Newhall, The History of Photography (1964); Miller, Click (1974); Lemagy and Rouille, A History of Photography (1987).]

At first, "sanctified by venerable artistic tradition" from ancient art onward, early photographers sought to imitate painters by stylizing nude images and placing them within "neoclassical" settings. As the artistic vocabulary of photography broadened, however, the "nude" in photography emerged as an art unto itself--"capable of its own kind of beauty." Since the middle of the 20th century, nearly every serious photographer has made the "nude" part of his or her study, if not part of

his or her oeuvre. [Ovenden, Victorian Erotic Photography (St. Martin's Press, 1973, p. 7)]

While nude photography has concerned itself primarily with adults, especially adult women, many photographers photographed nude children, thereby producing some of the world's most acclaimed photographs. Some of the same themes apparent in photographs of adult nudes--the realistic portrayal vs. the idealization of the human body, the artistic concern with light and form, the expression of erotic sentiment on the part of photographer, subject, or both--carried over to nudes of children. (See the photographs reproduced in Appendix A.) Several themes particular to child nudes emerged: innocence and vulnerability, sometimes more poignant in the naked state; the depiction of an emerging and uncorrupted sexuality; and sentimentality, like that felt by a parent for his or her child at certain junctures in life.



During the first half of the 20th century, with the greater availability of cameras and the simplification of photographic technology, both the number of art photographers and the number of photographs of nude children increased. Then, in the late 1920's and early 30's, a new theme -- the celebration of the naked human body -- emerged from the American and European nudist movements. These movements spawned a plethora of magazines -- some of them still produced today -- promoting physical and mental health in general, and the nudist lifestyle in particular; the core of this has been the family. The magazines often depict children, naked and happily at play, in testimony to the fact that nudity,

shame, and guilt are not intrinsically connected. The celebration of the naked human body became a theme greatly elaborated upon during the 60's and early 70's, when the publication of nudist magazines reached a peak.

With the rise of feminism, during the mid-to-late 1970's and 80's, additional themes emerged in the photographing of the child nude. The affirmation and celebration of the often somber beauty of child sexuality, as well as the problem of reconstituting female sexuality in patriarchal society, were explored by women photographers. The connection between women as "mothers" and "nurturers" and children also was investigated photographically. At the same time, experimentation with erotic, but non-pornographic, nudes of children flourished.



It was during this period, that "child pornography" came to be identified as a serious social problem. [See "Sexual Exploitation of Children," Hearings Before Subcommittee on Crime, Committee of the Judiciary, H.R., May 23, 25, June 10, and September 20, 1977.]

A list of artists who photographed nude children over the past thirty years reads like a "Who's Who" of photography: Irving Penn, Ralpy Eugene Meatyard, Emmet Gowin, Wynn Bullock, Harry Callahan, Joel Meyerowitz, Starr Ockenga, Ellen Brooks, Robert Mapplethorpe, Ralph Gibson and Sally Mann, are just a few photographers whose child nudes have been published in books and collected by museums throughout the United States and the world over. (See Appendices A and B). Because photographing the child nude offers artists (and their audiences)

realms of expression not available with other subject matter, the nude child became an important subject for photography -- one that American photographers and their audiences would be expected to continue to address unless kept from doing so by the "chilling" applicability of a law like that of Massachusetts which makes the taking of pictures of nude children a serious criminal offense.

**II Photography is a form of expression entitled to First Amendment protection. The "setting-up" (posing) and "taking" of a picture is an integral part of the photographic process culminating in the developed film and printed photograph. All this "expressive conduct" should be protected by the First Amendment.**

Unwilling to allow photographic freedom to be emasculated, the Supreme Judicial Court of Massachusetts struck down the law [G.L.c. 272, §29A (1986 ed.).] in Douglas



Oakes' case. In striking it down, the Court started with a proposition which it thought not seriously debatable: "Photography is a form of expression entitled to First Amendment protection just as the written or spoken word is protected." [401 Mass. 602, 603; 518 N.E. 2d 836, 837 (1988).]

We agree. Like motion pictures [Burstyn v. Wilson, 343 U.S. 495 (1952)], still photography has become a vital medium for the communication of news, information and ideas. [Lemagny and Rouillé, A History of Photography (1987).] And like most other media of communication, photography is a process with a beginning, middle and end. The process may be said to begin with the photographic idea, go on to the setting up and taking of the picture, and end with the exhibition of the printed photograph. The

conduct of the photographer in setting up and taking the picture is an integral part of the process of photographic expression; it cannot meaningfully be segregated from the other steps of the process for purposes of First Amendment analysis. In the context of the instant case, as the Supreme Judicial Court recognized: "The defendant's conduct in permitting his stepdaughter to pose naked above the waist cannot fairly be isolated...for First Amendment purposes, from the expressive process of taking her picture." The opinion continued: "The circumstances involved at all times both conduct and speech in the First Amendment sense." [401 Mass. 602, 603; 518 N.E. 2d 836, 837 (1988).]

The question of whether a person's behavior is to be characterized as "conduct" or "speech," or both, may have



important First Amendment implications. [See United States v. O'Brien, 391 U.S. 367 (1968); Gooding v. Wilson, 405 U.S. 518 (1972); Broadrick v. Oklahoma, 413 U.S. 601 (1973); Erznoznik v. City of Jacksonville, 422 U.S. 205 (1975)] Pure conduct is sometimes said to be unprotected by that Amendment whereas pure speech is usually treated as protected; again, the overbreadth doctrine is supposed to apply not to conduct but to speech. It seems to us, however, that the speech-conduct dichotomy familiar to this Court's First Amendment jurisprudence has not always proved helpful to a clear analysis and resolution of the free speech interests at stake. [See Henkin, The Supreme Court, 1967 Term--Forward: On Drawing Lines, 82 Harv. L. Rev. 63, 76-82 (1968).]

With respect to an art such as paint-

ing, drama, photography, or motion pictures, as with regard to a print medium such as newspapers, magazines or books, it would seem unlikely to matter whether the policeman stands at the elbow of the artist at work, or at the side of his exhibitor; at the elbow of the writer at work, or at the side of the person who publishes or distributes his work. The communication protected by the First Amendment is a process by which thoughts, emotions, images, and ideas are formulated by persons and worked into and out of this or that medium of communication, or form of expression. Thus the "posing of a model" and the "taking of a picture" are best understood as being integral parts of a complex process of creating a visual representation and exhibiting it.

It is accordingly our position that



whenever a statute makes "conduct" an element of a prohibition which restrains "speech" or other expressive actions ordinarily covered by the First Amendment, the overbreadth aspects of First Amendment jurisprudence should apply to both the conduct and the speech elements. If either the expression or the conduct covered by the statute includes action or expression which cannot constitutionally be prohibited, then the statute is unconstitutional even if the particular conduct or expression involved in Respondent's case could constitutionally be proscribed. This means, in the instant case, that First Amendment protections should apply to the conduct of Respondent Oakes in posing and photographing his stepdaughter "in a state of nudity" as well as to the printed photographs which expressed the results of

his conduct. It also means that the First Amendment overbreadth doctrine should apply to the conduct of parents and photographers who permit or cause children to be photographed nude.

The conduct prohibited under the challenged provision of Massachusetts law, Section 29A, is prohibited only when such conduct is engaged in "for purpose of visual representation or reproduction" in any book, magazine, pamphlet, motion picture film, photograph, or picture." Inasmuch as such "visual representation or reproduction is undoubtedly expression of the type that is normally covered by the First Amendment, the entire provision of Section 29A should be subject to the doctrines applicable to speech and press.

Finally, it should be observed that at the time of Respondent's indictment, the



dissemination (or possession for dissemination) of any photographic or film work depicting a nude child, which was created notwithstanding the prohibitions of Section 29A, was independently criminalized and threatened with the same severe punishment as was the conduct of creation--under Section 29B.[1] Thus, the State itself recognizes that the acts of setting-up and taking a photograph are integral parts of an expressive process leading to exhibition or distribution, and having First Amendment implications.

**III Most "child pornography" laws (including the "Ferber Law") were properly**

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[1]"Whoever disseminates any visual material that contains a representation or reproduction of any posture or exhibition in a state of nudity or of any act that depicts, describes, or represents sexual conduct participated or engaged in by a child...shall be punished in the state prison..."

**designed to prevent and punish only the taking of pictures or making of films which involved children in specifically defined "sexual conduct" or "the lewd exhibition of the genitals" because such conduct and exhibition were reasonably feared to be "harmful to the physiological, emotional, and mental health of the child." Section 29A of the Massachusetts law, by contrast, also outlaws visual depictions of child "nudity" although there is no reason to believe nudity is harmful to children. Many people believe it healthful and esthetically beautiful.**

During the 1970's most states and the federal government passed laws which reflected wide-spread fears that American children were being mentally and physically harmed by the commercial production and dissemination of "child pornography." [See "Sexual Exploitation of Children," Hearings Before the Subcommittee on Crime of the Committee on the Judiciary, H.R., May 23, 25, June 10 and September 20, 1977; New York v. Ferber, 458 U.S. 747 (1982).] The



harm feared was usually depicted as the sexual "abuse" or sexual "exploitation" of children; one suspected source of the harm, targeted by the new legislation, was the "widespread... photographing and filming (of) actual and simulated sexual acts involving children and distributing the products in interstate commerce." [Hearings, id., at 1]. Although most of those believed responsible were persons who "use inducements such as money, drugs, and representations of friendship to entice their young victims...in some instances even parents are inducing or permitting their own children in these practices." [Id.] Although the Chairman of the House Subcommittee which hel hearings on the subject in 1977 thought that "the solution to problems of sexual abuse and exploitation of young people perhaps does not lie

in increased criminal laws, but rather in approaching the problem through increased and improved attention in the areas such as child care, education, mental health, family support, juvenile delinquency facilities and employment," [Hearings, Id. at 3] the "solution" finally hit upon by the federal and state governments was more criminal laws promising very heavy penalties of fine and imprisonment for anyone, including parents, who caused or permitted children to engage in "sexually explicit conduct for the purpose of producing any visual or print medium depicting such conduct" [Public Law 95-225, 95th Congress, Feb. 6, 1978 (S.1585)].

The original federal legislative proposal to combat the sexual exploitation of children in photographs and films, and the dissemination of photographs or films de-



picting such exploitation, defined "child" as any person under sixteen and defined the prohibited sexual conduct quite specifically to include sexual intercourse, anal intercourse, masturbation, sadism and masochism, bestiality, fellatio, cunnilingus, and: "nudity, if such nudity is to be depicted for the purpose of sexual stimulation or gratification of any individual who may view such depiction." The Justice Department told the Congress that it found the provision regarding "nudity" "troublesome" because "it would be difficult to determine by what standard the 'sexual stimulation or gratification' could be assessed." Instead, the Department recommended use of the words "lewd exhibition of the genitals," which it pointed out was "a phrase used by the Chief Justice (Warren E. Burger) in Miller v. California, [413 U.S.

15 (1972)] ...to describe one of a variety of types of conduct which could be prohibited under state obscenity statutes." [H.R. Report No. 95-696, "Prohibiting the Sexual Exploitation of Children," 95th Cong. 1st Sess., Oct. 12, 1977 at p. 21; Testimony of John C. Keeney, in Hearings, ibid at 137.]

The phrase "lewd exhibition of the genitals" which the Congress substituted for the prohibition against "nudity," before the federal law was passed, was described by another witness at the House Committee hearings as referring to: "naked, spread-eagled children;" such poses were familiar to the witness and readers of the magazine entitled "Lollitots." [Testimony of Dr. Judianne Densen-Gerber, Hearings, ibid at 41]. Pictures of children posed in that way were apparently taken in



imitation of similar photographs of adult women, for run-of-the-mill "soft-core pornography."

As enacted, the federal law, like virtually all State laws that were enacted to combat the evil of child pornography, did not attempt to prevent photographic or filmed depictions of children "nude" or in a "state of nudity"--except, that is, indirectly to the extent that children engaging in the specifically prohibited sexual conduct might do so nude. Instead, the typical child pornography laws sought to prevent persons from causing or permitting children to be photographed or filmed engaged in "sexually explicit conduct," or "sexual conduct," which usually was specifically defined to include the "lewd exhibition of the genitals," as well as "sexual intercourse," "bestiality," "masturbation,"

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and like activities.

Unlike the production of visual depictions of children engaged in explicit sexual conduct, the production of visual depictions of nude children was not identified by legislators as involving incidents of child sexual abuse or exploitation. The reasons were probably three-fold: first, unlike the defined types of "sexual conduct" of children, nudity in children and visual representations of children nude had long been considered morally acceptable aspects of much family life and a well-known photographic tradition; permitting or causing children to "go nude," or be photographed nude, was okay. Second -- and again, unlike the case with "sexual conduct" -- it was generally not feared that permitting or causing children to be photographed nude was harmful to the



children; such behavior--certainly when consented to by parent and child--was not considered a type of child abuse or exploitation. Third, to prohibit the production of nudity in minors was thought likely to be held unconstitutional given this Court's decisions in Erznoznik v. City of Jacksonville, 422 U.S. 205 (1975) and Sunshine Book Co. v. Summerfield, 355 U.S. 372 (1958).

When, therefore, Massachusetts enacted into law a provision (Section 29A) which made it criminal for anyone, including a parent, to cause or permit a person under the age of 18 to be photographed "in a state of nudity,"[2] the state departed

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[2]The original version of Section 29A was adopted in 1977, Mass. Acts Ch. 917, §1. Section 29A was apparently amended following the Supreme Judicial Bench's decision in Oakes to require a showing that the defendant caused or permitted a child to pose or be exhibited "in a state of

radically from social norms as well as the legislative pattern established for child pornography laws by the United States Congress and the other states. We know of only two other States which appear to have taken this extreme approach -- Kansas, §21-3516, Kan. Stat. Ann. (Supp. 1987); and Ohio, in §2907.323, Ohio Rev. Code Ann. (1987 & Supp. 1987).

In the words of the Supreme Judicial Bench of Massachusetts, Section 29A "crimi-

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nudity," "with lascivious intent." Amicus expresses no view concerning the constitutionality of this addition except to note that similar language originally proposed in connection with federal legislation was thought by the Justice Department to be "troublesome" because the standard was so subjective. We also note that were the Commonwealth required to prove that Respondent Oakes took pictures of his stepdaughter "with lascivious intent," or a similar mens rea, the uncontroverted evidence indicates, to the contrary, that he did it with a motive to further his step-daughter's modeling career.



nalizes conduct that virtually every person would regard as lawful" and "makes a criminal of a parent who takes a frontal view picture of his or her naked one-year-old running on a beach or romping in a wading pool." (Commonwealth v. Oakes, 401 Mass. 602, 606; 518 N.E. 2d 836, 838 (1988).

There is no reason to believe and there is no evidence (scientific or otherwise) to support the notion that permitting or causing a child to be, or pose, in the "nude" is harmful to the child.[3] Neither is such a notion supported by common sense or

---

[3]The prosecuting attorney in this case, the District Attorney for the Middle District of Massachusetts, disagrees: He speculated (wtihout citing any authority) that: "Although they may not be engaging in actual or simulated sexual intercourse, children appearing nude already are being sexually exploited and run the risk of being drawn deeper into child pornography." [Brief for the Commonwealth in Commonwealth v. Oakes, No. 86-147, Commonwealth Appeals Court at page 7.]

experience which, instead, suggest that nudity and the depiction of nudity, in children, may, under some circumstances, certainly, be healthful and esthetically beautiful. To the extent that the Massachusetts law applied in this case criminalizes sexual conduct,[4] but also the mere depiction of the nude child, it has no basis in reason or experience. Since the law also sweepingly invades the First Amendment activities of photographers, film-makers and artists as well as parents; abrogates

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[4]The depictions of "sexual conduct" forbidden by the Massachesetts law in question are defined to include: "human masturbation, sexual intercourse, actual or simulated, normal or perverted, or any touching of the genitals, pubic areas, or buttocks of the human male or female, or the breasts of the female, whether alone or between members of the same or opposite sex or between humans and animals; any depiction or representation of excretory functions; any lewd exhibition of the genitals, flagellation, or torture in the context of a sexual relationship." [Section 29B]



the traditional rights of parents to control their children as they see fit; and invades the protected privacies of family and home, the statutory provision involved, Section 29A, should be struck down. In these respects, the Massachusetts law differs sharply from the New York statute, which this Court upheld as constitutional in New York v. Ferber, supra, against contentions that it was impermissibly "overbroad".

## IV Section 29A is substantially overbroad in view of the numerous occasions when persons lawfully permit or cause visual representations to be made of children nude. Most such occasions are protected by the First Amendment.

In his Petition for a writ of certiorari, the Attorney General of Massachusetts invited the Court to answer the question whether the "overbreadth" of the Massachu-

setts child pornography law is substantial enough to justify invalidation of the entire statute and the reversal of Respondent Douglas Oakes' conviction.[5] [Petition at "Question Presented"] Amicus submits it is. The New York law which was upheld by this Court as not impermissibly overbroad is distinguishable in purpose and effect from the Massachusetts law. The basic difference lies in Section 29A's labeling as "child pornography" mere depictions of children nude (i.e., "in a state of nudity"). In doing that the legislature overbroadly swept within the compass of the State's criminal law a great deal of conduct that "virtually every person would regard as lawful," ranging from the parent

[5]The ten year sentence meted out to Oakes contrasts bizarrely with the 45 days to which Ferber was sentenced.



who takes a frontal view picture of his or her naked child running on the beach, playing in a wading pool, or lying on a bearskin rug; to the parent who consents to his or her pubescent or adolescent son or daughter being photographed or filmed nude, or partially clad; to the professional photographer, artist or sculptor who employs children as models or subjects in the course of his or her work; to the film director who casts a child actor or actress in a scene involving nudity; to the families who, in pursuit of a chosen life style, live, work and play as nudists and express and make a record of that life-style in photographs or films.

Indeed, Amicus is of the opinion that the conduct which Respondent Douglas Oakes engaged in when he took an assortment of pictures of his partially clad step-

daughter is the kind of conduct which probably cannot itself be proscribed. (See Trial Exhibits 1-10). But even if it were, it cannot constitutionally be punished under this statute because this statute is overbroad. In this connection we note that although Section 29A provides a defense if the photograph or other work is made "for a bona fide scientific or medical purpose, or for an educational or cultural purpose for a bona fide school, museum or library," the defense is of no avail to persons wishing to have photographs of children taken for use in a modeling portfolio; or for exhibition in a commercial gallery, an art magazine, a book of photographs of the nude, or the family photo-album; or for their own use or experimental purposes, or for uses by the child.

Thus, if a photographer wished to pho-



tograph a 17-year-old girl with her breasts bared for any of the purposes indicated, the parent or custodian who requested or permitted such photographing, done with the consent as well of the child, would nevertheless be criminally liable. Furthermore, the photographer taking such a photograph for such use, with the parent's and child's consent, would also be subject to criminal prosecution and--inasmuch as good motive or salutary purpose is no defense--a severe punishment. This would follow even though no element of abuse or exploitation, and no "lewd" or "lascivious" intent existed, or was shown, and the girl asked to have herself so photographed. Thus there would be no way in which such photographs could lawfully be made, for First Amendment purposes.

**V Unlike almost every other State, and the federal government, Massachusetts has gone too far in its response to the dangers of child pornography. There is no need to criminalize depictions of child nudity in order to defeat sexual child abuse, exploitation or endangerment.**

Amicus is not here questioning the wisdom or validity of child pornography laws like the one which this Court upheld in Ferber. Unlike Section 29A, those laws criminalize the conduct of adults, including parents, who use the arts and techniques of photography and film to sexually abuse, exploit, or otherwise harm young children. Section 29A, by contrast was enacted and is being used (e.g. in this case) to prevent people like Respondent Oakes from taking nude photographs of their children, for example, to help them pursue acting and modeling careers, or for purely private (non-commercial) use as a family



record of stages in a child's physical development.

"Ferber-type" laws are aimed only at expressive conduct which involves children in inherently abusive, and exploitive ways; Section 29A too, is aimed at that sort of conduct. [See the detailed definition of "sexual conduct," proscribed by 29A, contained in Section 31]. But it is also directed at posing and depicting children nude under any and all circumstances. In seeking completely to blot out from the worlds of film and photography, and from family life, the image of the nude child, Massachusetts has gone too far. In reaching that far for control over images and ideas, the State has tread upon precious rights of freedom of expression and of parental rights to guide their own children's lives and careers.

Perhaps the legislature has now itself realized its mistep: On July 27, 1988 an amendment to Section 29A added to the elements of the crime of which Respondent Douglas Oakes was convicted a requirement that the defendant's "lascivious intent" be proved (c. 226, Acts of 1988). Whether the addition of this breathlessly broad and ambiguous mens rea can save the statute is, in Amicus' opinion doubtful; it does, however suggest that the Massachusetts legislature may finally have recognized, and sought to reduce, the immense overbreadth engendered by its attempt to indict all visual representations of child nudity that show genitals or female post-pubescent breasts.

There were clear indications in this Court's opinion in Ferber that the important governmental purpose of prevent-



ing "the sexual exploitation and abuse of children" would have to be carried out with due regard for the requirements of the First Amendment. Said Justice White, in his opinion for the Court in Ferber: "There are, of course, limits on the category of child pornography which, like obscenity, is unprotected by the First Amendment. As with all legislation in this sensitive area, the conduct to be prohibited must be adequately defined...." Justice White went on to emphasize that the expression which is excludable from First Amendment protection as "child pornography" must be "limited to works that visually depict sexual conduct by children below a certain age." And, he continued, "the category of 'sexual conduct' proscribed must also be strictly limited and described." Finally, citing Erznoznik v.

City of Jacksonville, 422 U.S. 205 (1975), he observed that "nudity, without more is protected expression."

When, shortly after Ferber was decided, Section 29A was re-enacted in the form it would take when Respondent Douglas Oakes came to be indicted. In doing that, the Massachusetts legislature ignored some of those words of caution from Justice White. While the statute did "limit and describe" proscribed "sexual conduct" [see the detailed definition in Section 31], it failed utterly to "limit" the sweep of its definition of child pornography, excludable from First Amendment protection, to works that visually depicted such "sexual conduct." It failed by again enacting the proscription against any visual depictions of a child "in a state of nudity."

The Court's opinion had pointed out a



possible alternative to the blotting out of child nudity through use of the term "lewd exhibition of the genitals." As Justice White observed in Ferber, this term had been given, in Miller v. California, 413 U.S. 15, 25 (1972), as "an example of a permissible regulation."

Massachusetts, however, did not follow the Court's suggestion. Instead -- to judge from the legislative and law enforcement policies it pursued -- it sought to ban from sight every depiction of a child's genitals (not merely "lewd" ones) and every depiction of a pubescent or adolescent girl's breasts as well. Perhaps such sights, in the minds, at least of some concerned citizens, were "lewd" or "lascivious" per se; or they were felt improperly to invade the privacy of children so depicted.

For some citizens, at any rate, Ferber came to be interpreted as a decision which turned not so much on the likelihood alluded to by Justice White -- that a child will be "physically or psychologically harmed in the production of the work," -- but instead on the putative "privacy interests" of children who might someday regret the consents given by them or their parents[6] to persons making the visual representations in question. [See footnote 9 in Ferber, supra; See also: Brief Amici Curiae of Covenant house and The National Center for Missing and Exploited Children herein, at pp. 15-27; Brief Amicus Curiae of Citizens for Decency Through Law, Inc. herein, at pp. 5-8.

But, we submit, the privacy of post-

---

[6]See Shields v. Gross, 58 N.Y.2d 337, 461 N.Y.Supp.2d 254 (1983).



pubertal girls, as of other girls and boys, can be and is adequately protected, and respected, with regard to non-abusive, non-exploitative (including nude) photography, by the law of torts and contracts and the legal requirements of child and parental consent, where commercial uses are anticipated. Where commercial uses are not anticipated, the laws regarding parental rights of control over their children and parental obligations not to abuse, endanger, or neglect them, can suffice. In this connection, it should be noted that the prohibition of Section 29A against depictions of nudity deprives minors of the rights they otherwise enjoy, under contract law, to engage photographers to photograph them nude.

The "legitimate sweep" of Section 29A properly ends with the sort of "sexual

conduct" described in Section 31. Beyond that is mere "nudity" and far-reaching overbreadth.

**VI Under Section 29A, no one can tell whether a Massachusetts prosecutor will label a "family-album" nude child photograph "innocent," or a nude child "art" photograph "legitimate"; or, on the contrary, "sexually suggestive" and "criminal." The prosecution of Douglas Oakes for taking "pin-up" type pictures of his partially clad teenaged step-daughter is an example of how an over-broad law may be abused by prosecutors.**

Petitioner claims to know of "no cases in Massachusetts that involve prosecutions under Section 29A for the "taking of innocent family-album-type photographs of children or anything resembling legitimate art." [Brief for Petitioner at 29]. In saying this Petitioner not only concedes that Section 29A is impermissibly over-broad, but suggests that it is unconstitu-



tionally vague as well. Under an overbroad law like Section 29a, citizens cannot be sure they will not be prosecuted and imprisoned for conduct which they know ought to be protected, but which the terms of the law proscribe. Under a vague law, as Section 29A is being construed by Petitioner, citizens cannot tell what is lawful and what is not, and those who enforce the law are permitted to be arbitrary and discriminatory in the decision of whom to arrest and prosecute. [See Papachristou v. City of Jacksonville, 405 U.S. 156 (1971); Tribe, American Constitutional Law at 718 ff. (1978)]

Who is to tell whether the parent who takes a picture of his or her son or daughter, in the bathtub is taking "an innocent family-album type" photograph or one, instead, which the District Attorney

would consider "sexually suggestive" and therefore "sexually exploitative" and "criminal"? Who is to tell whether the photographer who takes a picture of a consenting mother's minor daughter nude in his studio is creating "legitimate art" or a photo which the District Attorney would see as "sexually suggestive" and, accordingly, "sexually exploitative," "criminal", and worth ten years of prison time? Can it be doubted that the average photographer or the average parent, faced with the possibility of being required to spend a minimum of ten, and a maximum of twenty, years in prison as the price of taking an "innocent" family-album or "legitimate" art photograph -- if the District Attorney, in his unbridled discretion, considers it "sexually suggestive" -- will opt for taking no photographs



at all? These are the <u>real</u> effects of "overbreadth".

The evidence showed that Respondent Oakes did nothing more than take pictures of his partially-clad teen-aged step-daughter, lounging atop the bar in the family's rec room, in a mode that was traditional to "pin-up" art photography. Was Douglas Oakes sentenced to spend ten years in prison because although he thought he was making "pin-up" art, the District Attorney thought they bore no resemblance to "legitimate art"? Says the Petitioner in his brief on the merits at page 32: "The poses, chosen by Oakes, are obviously contrived and are either sexual or sexually suggestive." Elsewhere, he calls the shots "Playboy-type poses" as though this would suffice to condemn them (Petitioner's <u>Brief</u> at p. 31)

We do not find them so. And we do not believe this Court can find them so. (See Trial Exhibits 1-10). It is noteworthy that the only analagous cases alluded to by Petitioner are cases which involved not visual depictions of mere child nudity, but "lewd" or "lascivious" exhibition of the genitals. [Cases cited footnote 32, Brief].

But even if the photographs in this case could reasonably be found "sexual" or "sexually suggestive," such attribute is not relevant to the "crime" defined by Section 29A, which permits judges and juries to convict on a mere finding of nudity. That is why 29A is unconstitutional. The statute's proscription is so vague and/or overbroad that many "family-album-type" nude child photographs and many nude child photographs



"resembling legitimate art" may be deemed criminal child pornography -- in the prosecutor's unbridled discretion, which is to say whenever he sees them as "sexually suggestive," not "innocent" or "legitmate". But this is to put a public prosecutor in every family rec room and in every photographer's studio.

The trouble with vague laws is that people have to guess at their meaning. The trouble with overbroad laws is that they threaten to punish persons for engaging in conduct which is constitutionally protected. Section 29A forbids the taking of photographs of children nude. Standing alone, the taking of pictures of children nude is not criminal; it is expressive conduct that is constitutionally protected. Erznoznik v. City of Jacksonville 422 U.S. 205 (1975); Sunshine Book Co. v. Summer-

field, 355 U.S. 372 (1958). The serious and widespread chilling effect which Section 29A, if sustained, can be expected to have upon parents, photographers, and others wishing to express ideas and emotions about children through film and photography militates against this Court sustaining this law.

Such laws and such prosecutions are not necessary to the defeat of child pornography, child exploitation, or child abuse. Their purpose and potential effect instead is to erase the image of the nude child from popular cultural consciousness and private expression. That is an illegitimate because a censorial purpose; it is one which cuts to the heart of free expression.

**VII There are many instances in which critically acclaimed photographers, filmmakers, and artists produce works involving child models and actors that would be criminal if Section 29A were applied to them.**



In Ferber, supra, this Court upheld the validity of a child-pornography statute against a claim that it was unconstitutionally overbroad. To do so, the Court had to overrule a holding of the New York Court of Appeals that the law was fatally overbroad, thereby violating the First Amendment. Ferber v. New York, 52 N.Y. 2d, 674, 422 N.E.2d, 523 (1981). The Court's reasoning in Ferber was that New York's child-pornography statute was a law "whose legitimate reach dwarf(ed) its arguably impermissible applications," and so one only marginally overbroad. The only impermissible applications imaginable by the Court, under the New York law, were the unlikely occasions in which there was a need to employ children to engage in "sexual conduct -- "in order to produce

protected educational, medical or artistic works." Justice White pointed out that it was not even "suggested" that such impermissible applications of the statute could amount "to more than a tiny fraction of the materials within the statute's reach."

Here, however, the situation is dramatically different. Here, the impermissible applications of the statute -- the posing of children "in a state of nudity" -- is a frequent incidence of both family life and the photographic arts. Here, instances of potential impermissible applications abound. Of particular concern to Amicus, as it has indicated, are the myriad occasions when photographers and other artists wish to make a creative statement by taking pictures or making other visual representations of children nude, or



partially clothed. Under Section 29A, such artistic expression is foreclosed even with parental (and child) consent. In fact, 29A criminalizes the consenting act of the parent as well as the artistic act of the photographer.

Photographic and other artistic visual representations of children nude are, as previously suggested, ordinarily designed to communicate some esthetic, emotional, psychological, or physical "truth" perceived by the photographer (and his intended audience) as special to his subject matter. Statements of this nature cannot always be made through visual depictions of a child clothed. In such cases, it is the sight of the child's nude body, or of some feature of the child's nude person, which is crucial to the photographer's communicative purpose. Appendix A to

this brief consists of a small sample of nude pictures taken by recognized and critically acclaimed photographers, collected from named, widely-available published books on photographic art. Were the men and women who took these pictures, or any of the more than a hundred nude photographs reproduced in the books we have listed in Appendix B-1, to be subject to the Massachusetts law, all would commit crimes calling for lengthy prison terms.

Section 29A's clearly overbroad and possibly vague prohibitions similarly jeopardize the freedom of filmmakers to employ child actors and the freedom of painters, sculptors, and other graphic and fine artists, to employ child models. The critically acclaimed motion picture Pretty Baby, directed by the distinguished French filmmaker Louis Malle, is probably the most



obvious example, from the motion picture field. We have identified a few other such arguably "criminal" films in Appendix B-2.

Finally, Amicus has attached as Appendix C reproductions of copies of five internationally acclaimed works by the painters Stanislaus Klossowski de Rola Balthus, Dod Procter, and Graham Ovenden, the creation of which in Massachusetts, involving a use of child models, would also violate the law. We find it hard to imagine this Court approving such a gross censorship of beauty and humanistic expression.

**VIII Rights of parental control and family privacy, taken together with rights of free expression, should preclude criminalization of parental conduct causing or permitting visual representations of their children nude -- except when definite elements of child abuse or endangerment are present and proved.**

When conduct by a child's parent or custodian is engaged in for purposes of expression, rights of parental control and family privacy, as well as First Amendment rights, preclude the criminalization of such conduct unless definite elements of child abuse or endangerment are present and proved. A state has a legitimate, even compelling, interest to prevent such abuse and endangerment of children; this interest can justify prohibiting parental conduct, including expressive conduct, to the extent necessary to prevent such abuse and endangerment, under properly drawn statutes. This much Ferber affirmed and this much Massachusetts's proscription of depictions of child "sexual conduct" would accomplish. (See Section 31.) However, Section 29A prevents a parent or custodian from



photographing or consenting to the photographing of his or her child nude in the absence of any showing whatsoever that an element of child abuse, exploitation, or endangerment is present. The application of Section 29A to criminalize Respondent Oakes' conduct in taking "pin-up" pictures of his stepdaughter nude above the waist -- in the absence of any evidence that the circumstances were abusive, endangering or exploitive -- itself demonstrates the impermissible encroachment of the law upon parental and family rights of privacy and freedom of expression. Since Section 29A as construed and applied in this case criminalizes the posing of children nude by or with the consent of parents under all circumstances, even those concededly benign and salutary, it is unconstitutional.

## CONCLUSION

For all of the foregoing reasons, the judgment of the Supreme Judicial Court of Massachusetts, declaring Section 29A to be unconstitutionally overbroad, should be affirmed.

Respectfully submitted,

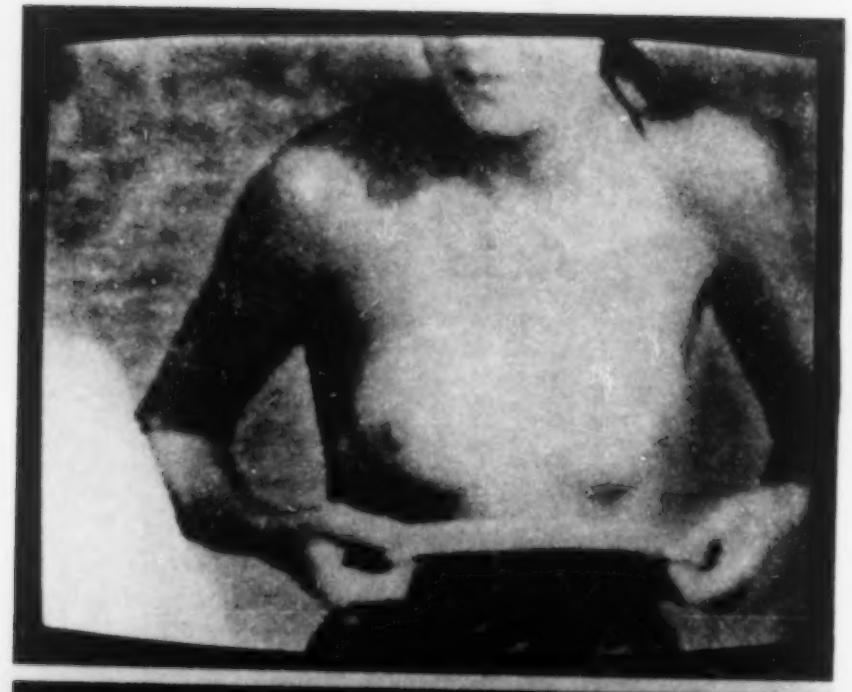
Edward de Grazia
41 Fifth Avenue-19B
New York, N.Y. 10003
(212) 260-6767

Counsel of Record

Lawrence A. Stanley,
Of Counsel

Plate 1

Plate 2



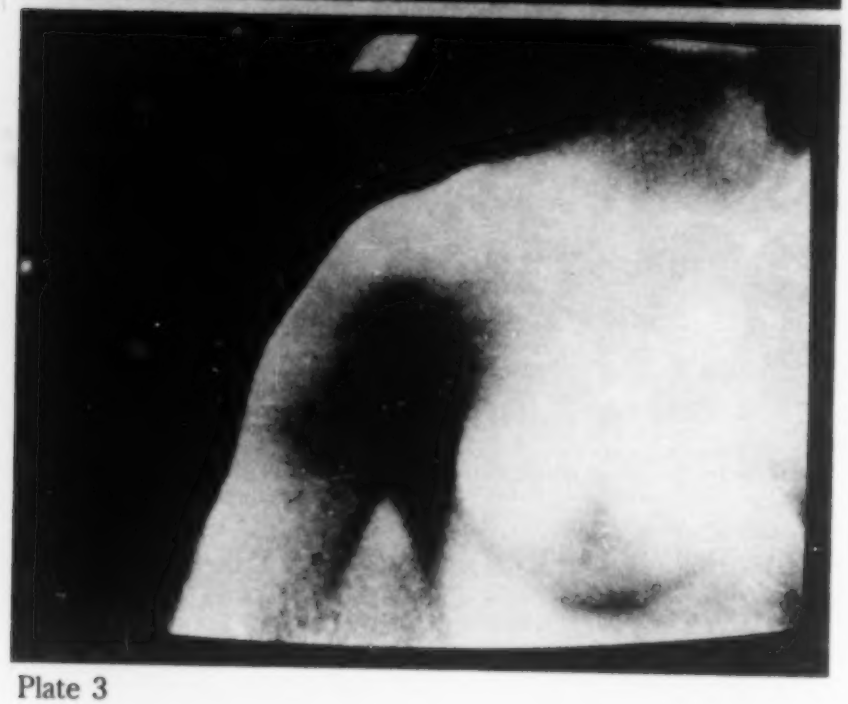


Plate 3

Plate 4

Plate 5

Plate 6

Plate 7

Plate 8

Plate 9

Plate 10

Plate 11

Plate 54

Plate 55

Plate 22

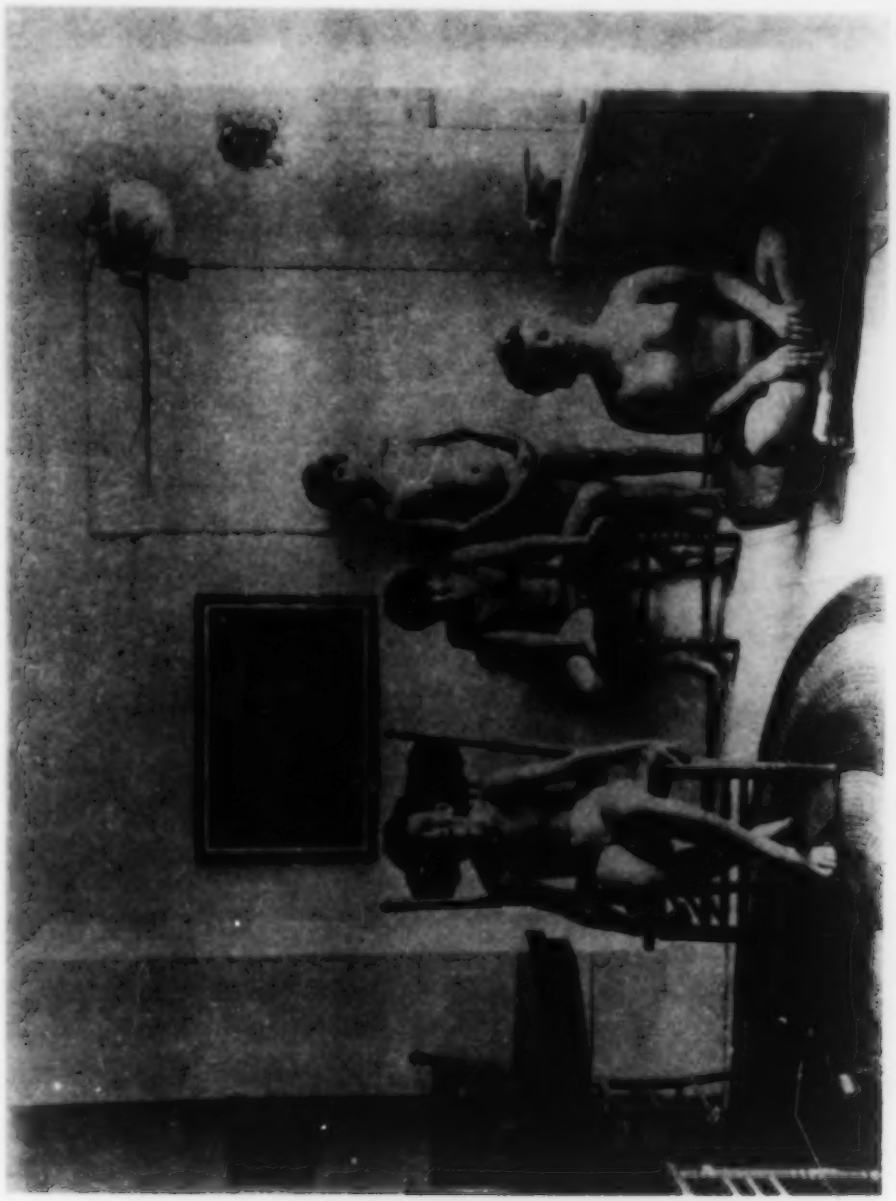


Plate 23

Plate 51

Plate 50

Plate 17

Plate 18

Plate 16

Plate 17

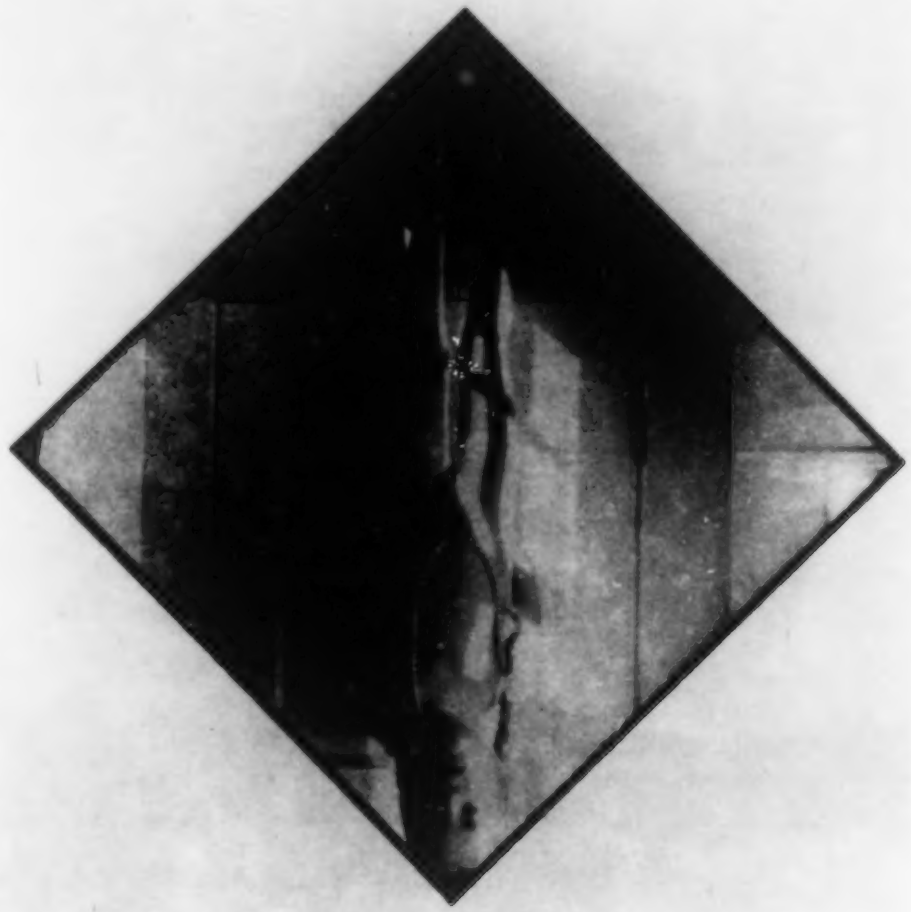


Plate 14

Plate 15

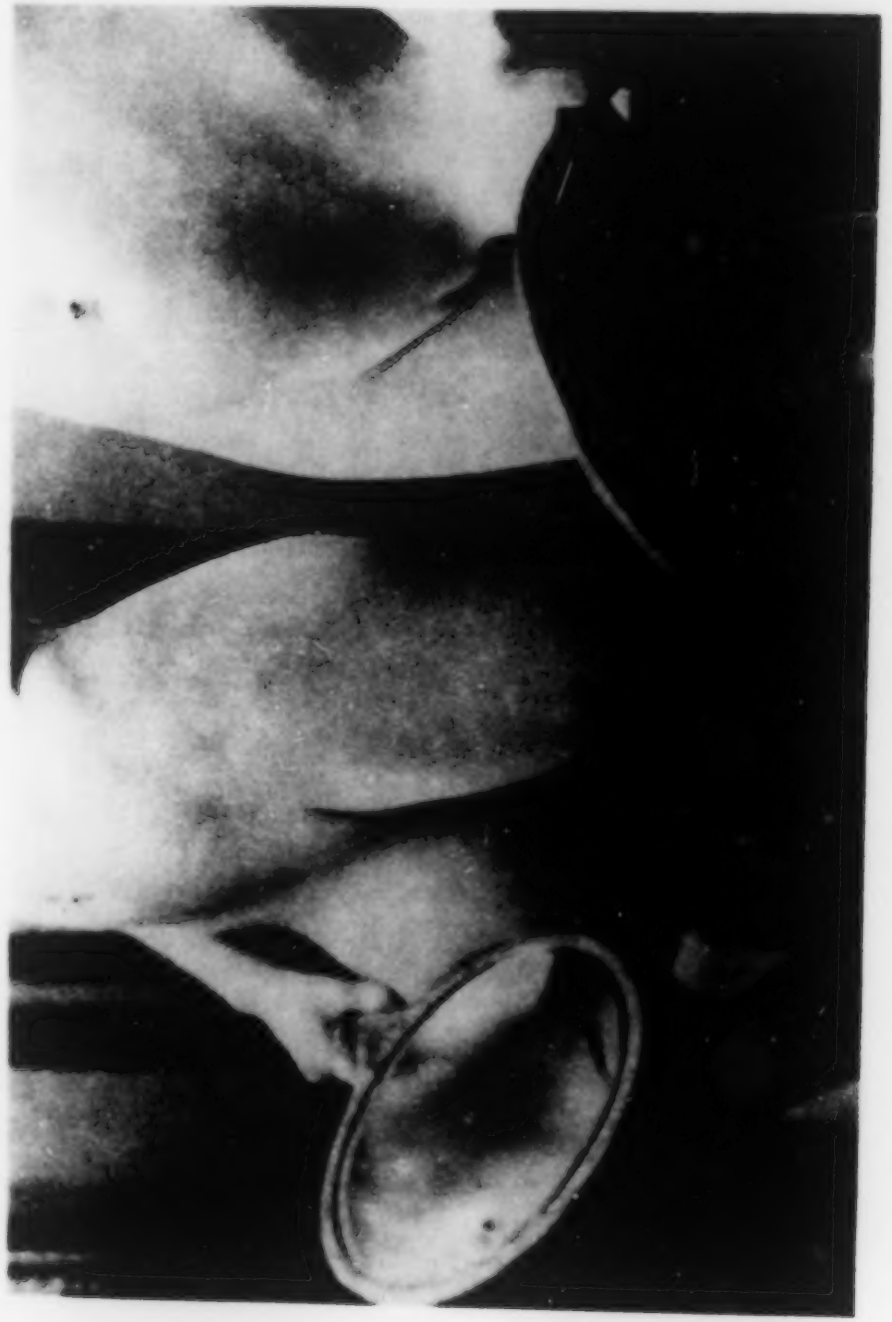


Plate 13

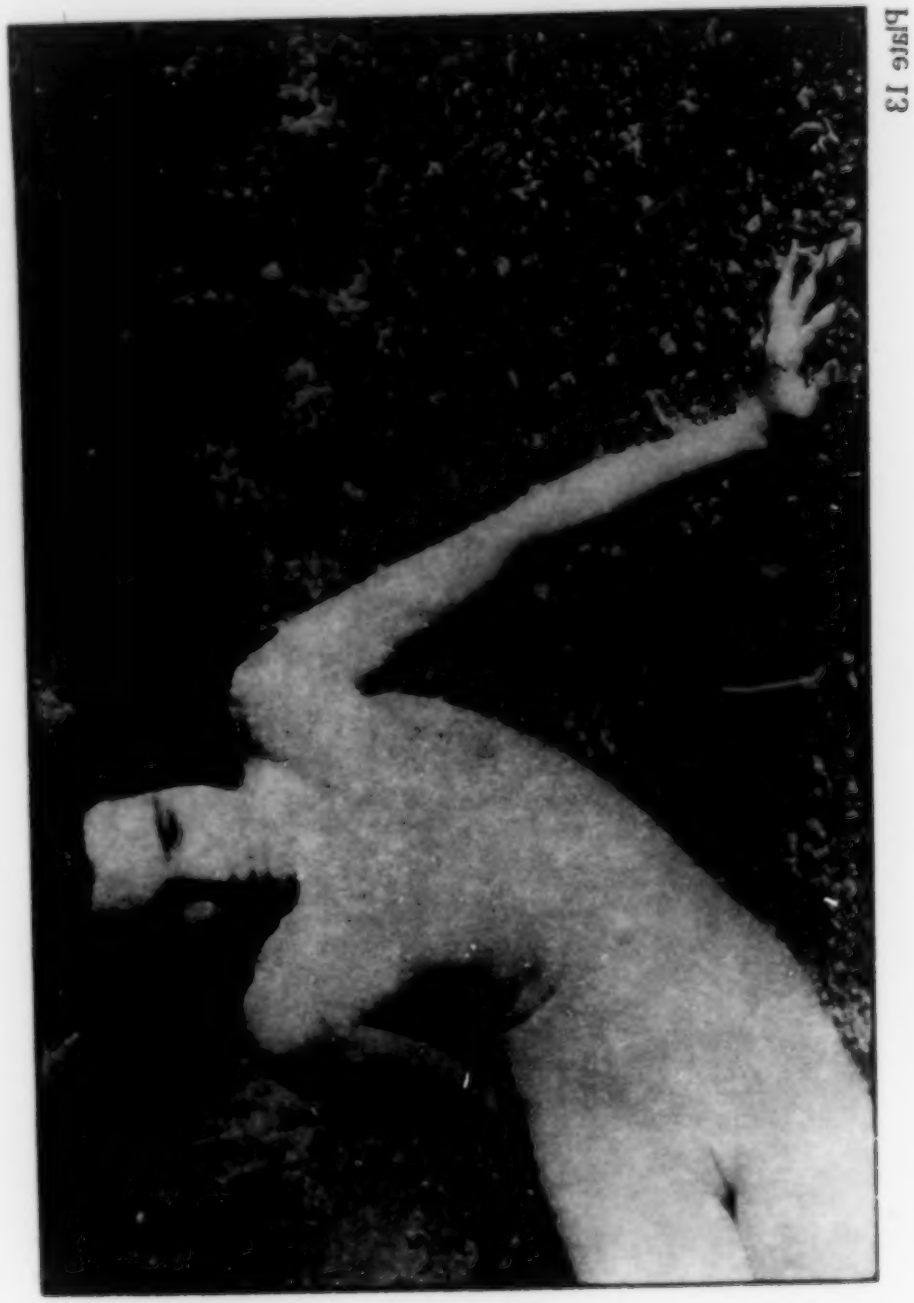


Plate 14

**Titles - Photographers - Publications,**
**Plates 1-25**

*Plate 1: Sally Mann. In Mann, Sally. At Twelve. New York: Aperture, Inc., 1988.

*Plate 2: Irina Ionesco, "Columbine, 1975". In Photography Year 1977. New York: Time-Life Books, 1977.

Plate 3: Larry Rivers. In Malanga, Gerard. Scopophilia. The Love of Looking. New York: Alfred van der Marck Editions, 1985.

Plate 4: Robert Demachy, "Primavera, series, 1896". In Demachy, Robert. Photographe. Paris: Contrejour, 1980.

Plate 5: Angelo Cozzi. In Cozzi, Angelo. Innocence in the Mirror. New York: William Morrow & Co., 1978.

Plate 6: Charles du Bois Hodges, "Little Sister". In Hodges, Charles du Bois. Search of Young Beauty. Cranbury, NJ: AMPHOTO (A. & S. Barnes & Co.), 1964.

Plates 7: Charles du Bois Hodges, "Contour & Relief". In Hodges, Charles du Bois. Search of Young Beauty. Cranbury, NJ: AMPHOTO (A. & S. Barnes & Co.), 1964.

Plate 8: David Hamilton. In Hamilton, David. The Young Girl. New York: William Morrow, 1978.

Plate 9: Dorothea Lange. In Sullivan, Constance. Nude Photographs 1850-1980. New



York: Harper & Row, 1980.

Plate 10: Bob Willoughby. In Mason, Jerry. The Family of Women. New York: The Putnam Publishing Group / The Ridge Press, 1979.

Plate 11: Christian Vogt, "Nina". In Selections 1: From the Polaroid Collection. Shaffhausen, Switzerland/Cambridge, MA: Polaroid Corp., 1982.

Plate 12: George Platt Lynes. In Sullivan, Constance. Nude Photographs 1850-1980. New York: Harper & Row, 1980.

Plate 13: Cynthia MacAdams. In MacAdams, Cynthia. Rising Goddess. New York: Morgan & Morgan, 1983.

Plate 14: Beth Saari, "Noelle, 1980". In Minkkinen, Arno. New American Nudes. New York: Morgan & Morgan, 1984.

Plate 15: Ralph Gibson. In Gibson, Ralph. L'Anonyme. New York: Aperture/Contrejour, 1986, and Days At Sea. New York: Lustrum Press, Inc., 1974.

Plate 16: Jan Saudek, "La tentation, 1970". In Saudek, Jan. The World of Jan Saudek. New York: Aperture, 1984.

Plate 17: Starr Ockenga. In Ockenga, Starr. Mirror After Mirror. Reflections on Women. Garden City, NY: AMPHOTO, 1976.

Plate 18: Joan Liftin. In Olsen, Tillie & Estelle Jussim. Mothers & Daughters. That Special Quality. New York: Aperture Foundation, Inc., 1987.

*Plate 19: Imogen Cunningham. In Sullivan, Constance. Nude Photographs 1850-1980. New York: Harper & Row, 1980.
Plate 20: Peter Simon. In Simon, Peter. Moving On/Holding Still. New York: Grossman Publishers, 1972.

Plate 21: John Benson, "Children at Home, Provincetown, MA". In Kinderen voor de camera. Amsterdam: Time-Life Books, 1983.

Plate 22: Tamarra Kaida, "Kris & Paul" from "Fathers/Sons," 1980. In Minkkinen, Arno. New American Nudes. New York: Morgan & Morgan, 1984.

*Plate 23: Edward Weston, "Neil". In Sullivan, Constance. Nude Photographs 1850-1980. New York: Harper & Row, 1980.

Plate 24: Wilhelm von Gloeden, "Jugendlicher mit Blumenkrantz, ca. 1900." In Pohlmann, Ulrich. Wilhelm von Gloeden - Sehnsucht nach Arkadien. Berlin: Dirk Nishen Verlag, 1987.

Plate 25: Bob Seidemann. From the album "Blind Faith," by the group Blind Faith, released by Polydor Records in 1969. A reproduction of this famous cover also appears in a box set, Crossroads, by Eric Clapton, a compilation released by Polydor (U.S.) in 1988.

*Photographs which depict the photographer's child.





## The Photographers

**COZZI, Angelo.** (b. Milan, 1934). During the 60s, Cozzi was worked as a photojournalist for Mondadori Publishing Co. (Italy) and the popular magazines Grazia, Epoca, Storia Illustrata, and Domenica del Corriere. His photographs of the coronation of the Shah of Iran were the first photographs ever to be used on cover of the latter magazine. Cozzi has photographed many important world events of the 60s and 70s, including the Vietnam War, the 1967 Arab-Israeli War, the launching of Apollo II at Cape Kennedy. In 1969, he was awared the Priathlon Club prize for best sports photography for his coverage of the Olympics. His photographs of young girls reflected in mirrors have been exhibited in Milan and New York. [Plate 5]

**CUNNINGHAM, Imogen.** (b. Portland, 1883). Cunningham studied photography with Gertrude Casebier and studied photochemistry in Seattle from 1902-6. As assistant to Edward S. Curtis, Cunningham learned the platinum print technique. In 1910, Cunningham opened her portrait studio in Seattle and moved to San Francisco 1917, where she lived until her death in 1976. In the early 30s, together with Edward Weston, Ansel Adams, and Dorothea Lange, she co-founded the photographic group f/64 and from 1935 on produced primarily portraits and still lifes. Cunningham taught at the California College of Art (Oakland), the San Francisco Art Institute, and the Ansel Adams Workshop, Yosemite Park, California. She received a Guggenheim

Fellowship in 1970, the Artist of the Year award from the San Francisco Arts Commission in 1973, and the Summa Laude Dignatus Award from the University of Washington, 1974. Among the institutions which have collected Cunningham's work are the San Francisco Museum of Modern Art, the Center for Creative Photography, University of Arizona (Tucson), the Art Institute of Chicago, the International Museum of Photography, George Eastman House, the Metropolitan Museum of Art, the Smithsonian, and the Library of Congress. [Plate 19]

**DEMACHY, Robert.** (b. Paris, 1859). In 1882, Demachy was appointed to the Societe Francaise du Photographie and became a major proponent of pictorialism in France. After publishing in the presigious American publication, Camera Work (1904), he was awarded the Chevalier de la Legion d"Honeur of France and was nominated to the Royal Photographic Society (U.K.) as an honored member (1905). He is the author of numerous articles on aesthetics, the practice of photography, and photographic chemistry and technique. His work is in the collections of the Biblioteque Nationale (Paris), the Metropolitan Museum of Art, and the Gernsheim Collection, University of Texas, Austin. [Plate 4]

**GIBSON, Ralph.** (b. Los Angeles, 1939). From 1956-60, Gibson was a photographer for the U.S. Navy. During the early 60s, he was an assistant to Dorothea Lange and camera man for Robert Frank, after which he worked as a freelance photojournalist and fashion/publicity photographer. In 1970, Gibson founded Lustrum Press, a leading American



photographic publishing company. He was the recipient of a National Endowment for the Arts Photography Fellowship in 1973 and again in 1975, a Creative Artist Public Service Grant (New York), and the DAAD Exchange Fellowship (Berlin). He has exhibited throughout the world in such prestigious galleries and museums as Castelli Graphics (New York), International Museum of Photography, George Eastman House (Rochester), Baltimore Museum of Art, Kunstmuseum (Duesseldorf), and the Center for Creative Photography, University of Arizona (Tucson). His work is in the collections of the National Gallery of Canada, the Biblioteque National (Paris), the Victoria and Albert Museum (London), the Fogg Art Museum (Harvard University), the San Francisco Museum of Modern Art, the George Eastman House, and the Museum of Modern Art. [Plate 15]

**von GLOEDEN, Wilhelm.** (b. 1856, Mecklenburg, West Germany). In 1880, suffering from ill health, von Gloeden moved to southern Italy, where he learned photography from Wilhelm Plueschow. Von Gloeden is one of the most frequently written about of the early photographers and is best known for his Arcadian scenes and nudes and semi-nudes of adolescent boys taken in Sicily and Naples. [Plate 24]

**HAMILTON, David.** (b. England, 1933). Hamilton has been art director for Queen magazine (London) and his work has appeared in Twen, Esquire, Vogue, Penthouse, Playboy, and Oui. He has exhibited his work at the Photogalerie Portfolio (Lausanne) and his own Galerie Mona (Paris). Hamilton has pro-

duced over ten popular books of photographs of young girls and has sold more than 500,000 of those books throughout the world. [Plate 8]

**HODGES, Charles Du Bois.** A graduate of Princeton University in 1930, Hodges studied photography at the Clarence White School of Photography in Maine in 1931-2. During World War II, he was a photographer for the U.S. Navy and, after the war, established a commercial photography business in Springfield, Massachusetts. He was the official family photography for Sargent Family of Massachusetts and lectured motion picture and portrait photography at University of Massachusetts. His work has been exhibited at the Berkshire Museum (Pittsfield, MA); the Jasper Rand Art Museum (Westfield, MA); the City Library (Springfield, MA); the Holyoke Museum (Holyoke, MA); and The Art Gallery (Springfield, MA). His work is featured in his book, In Search of Young Beauty, as well as in Photo Maxima, vol. 4, an annual juried collection of the finest photography in the United States. [Plates 6-7]

**IONESCO, Irina.** (b. 1935, Paris). Ionesco's work has been exhibited in galleries as far apart as Paris' Galeries Loplop and Nikon, the Canon Photo Gallery in Geneva, Galleria Spectrum, Barcelona, and Tokyo's Pentax Gallery. The photograph reproduced here, Columbine, 1975, is of her daughter Eva at eleven years of age. Ionesco was chosen "Woman of the Year" by Time-Life in 1977. [Plate 2]



KAIDA, Tamarra. Tamarra Kaida received her M.F.A. in 1979 from the State University of New York at Buffalo and the Visual Studies Workshop in Rochester. Her black and white portraits of children have been a part of several major exhibitions in the past year, including "Contemporary Photography and Phantasy" at the Santa Barbara Museum of Art, and "Between Twelve and Twenty" at the Loomis Institute, Windsor, Connecticut. In recent years, her images have appeared in such publications as Camera 35, Exposure, and the Time/Life Library of Photography. Kaida received the Ferguson Grant from the Friends of Photography. She is also on the faculty at Arizona State University in Tempe. [Plate 22]

**LANGE, Dorothea.** (b. NJ, 1895). Lange studied photography at the Clarence White School, Columbia University and was a co-founder of the group, f/64 during the 1930s. She was photo-reporter for the California Rural Rehabilitation Administration (Resettlement Administration, later Farm Security Administration (FSA) under Roy E. Stryker, q.v. from 1935); the U.S. War Relocation Agency in 1942; the Office of War Information, 1943-5; and on the staff at Life Magazine during the 50s. In 1941, Lange received the Guggenheim Fellowship. Her works are in the collections of the Museum of Modern Art, New York Public Library, George Eastman House, Library of Congress, Photographic Archives, University of Kentucky, and the San Francisco Museum of Modern Art, among others. [Plate 9]

**LIFTIN, Joan.** (b. NJ, 1935) During the 1970's Lifton was photo editor of the United

Nations Children's Fund and assignment photographer for UNICEF. Her work has been shown in many exhibitions, including the Lyman Allyn Museum, the Neikrug Gallery, and the Soho Photo Gallery. Since 1975, she has been the director of the Magnum Library. Examples of her works were purchased by the George Eastman House. [Plate 18]

**LYNES, George Platt.** (b. NJ, 1907). Lynes was a self-taught photographer who achieved fame with his portraits of famous writers, composers, theater people and artists, including Stravinsky, Cocteau, Auden, and Chagall. During the 40s, he was the head of Vogue studios in Hollywood. His work appeared in Town & Country, Harper's Bazaar, Vogue, and other fashion magazines. His photographs are in the collections of the Metropolitan Museum of Art, the Museum of Modern Art, the New York Public Library, the George Eastman House, Smith College (MA), and the Art Institute of Chicago. [Plate 12]

**MacADAMS, Cynthia.** (b. SD, 1939). MacAdams graduated from Northwestern University in 1961 and spent 15 years as an actress before turning to photography. She is best known for her bold protraits of women and her nude studies of women and girls. Her portraits of women were published in the book, Emergence in 1977. [Plate 13]

**MANN, Sally.** Mann has exhibited and taught nationally. Her work has been collected by the Metropolitan Museum of Art, the Museum of Modern Art, the Chrysler Museum, the Corcoran Gallery, the San Francisco Museum of



Modern Art, and other major collections throughout the United States. She has received grants from the National Endowment for the Arts, the National Endowment for the Humanities, the Friends of Photography and, most recently, the John Simon Guggenheim Foundation. She is represented by the Marcuse Pfeifer Gallery in New York, where she has had three major shows over the past two years. [Plate 1]

OCKENGA, Starr. (b. Boston, 1938). Ockenga was a student of Robert Heinecken, Aaron Siskind and Harry Callahan. In 1974, she received as MFA in Photography from the Rhode Island School of Design and was appointed photo editor and chief photographer for the Lawrence (MA) Eagle Tribune. From 1976-82 she was first assistant professor of photography and then Director of the Creative Photography Laboratory at the Massachusetts Institute of Technology. In 1984, she was a visiting professor at Bennington College, Vermont. Ockenga has received various grants and awards, including a National Endowment for the Arts fellowship for a series of nudes (1981) and a grant from the Massachusetts Artist Foundation. Her work has been included in exhibitions the world over, including "Photography Unilimited" at the Fogg Museum (Harvard University), and "Photography as Fine Art," a traveling show prepared by the United States Information Agency for sixty United States embassies overseas. Her work is in the collections of the Museum of Modern Art and the Bibliotheque National (Paris). [Plate 17]

**RIVERS, Larry.** (b. New York, 1925) Rivers is a visual artist who works with canvas, paint and mixed media and is well-established among contemporary artists. Rivers studied at the Hans Hofmann School of Fine Arts, New York University, in 1948-9. Works in Brooklyn Museum, Corcoran Gallery of Art, Kansas City Art Institute, Metropolitan Museum, the Museum of Modern Art, the Hirshhorn Museum (Smithsonian), the Minneapolis Institute of Art, and in many private collections. The depictions reproduced here were from a videotape which Rivers made of his daughters' breasts as they developed. [Plate 3]

**SAUDEK, Jan.** (b. Prague, 1935). Saudek graduated fro the School for Industrial Photography and Technique, Prague, in 1955. Shortly after tha, he established his own studios and has gained an international reputation for his nudes and handcolored photographs. He has exhibited at Recontres d'Arles (France), Photokina (Cologne), FNAC (Paris), Marcuse Pfeifer (New York), Camden Arts Centre (London), National Gallery of Victoria (Melbourne), the Art Institute of Chicago, and the University of Indiana, Bloomington. Saudek's work has appeared on over two dozen postcards and posters sold in art shops and bookstores across the United States. [Plate 16]

**VOGT, Christian.** (b. 1946, Basel). Christian Vogt began his career as an assistant to Will McBride. Since the early 70's he has been a fee lance photo designer and the best known Swiss art photographer today. He is the recipient of a number of prizes and grants, including the Photokina Award,



Cologne; a Swiss National Scholarship; the Grand Prix, Trienniale of Photography, Fribourg; the Art Award, Lyon; a Canada Council grant; and the Art Directors Club Award, Germany. He has exhibited at the Canon Gallery (Amsterdam), International Center of Photography (New York City), Focus Gallery (San Francisco), University of North Dakota, Grand Forks, and Galerie Trockenpresse, West Berlin, among other places. [Plate 11]

**WESTON, Edward.** (b. Highland Park, 1886). Weston attended the Illinois College of Photography and established his first studio in Tropico, CA in 1911. In 1922, he met Alfred Stieglitz and Paul Strand and turned from art to pictorial photography. In the early 30s, Weston was a co-founder, together with Imogen Cunningham, Ansel Adams, and Dorothea Lange, of f/64. He was the first photographer to receive the Guggenheim Foundation Grant (1937) and is one of the best known and most revered photographers in photographic history. Weston's nude of his son, Neil, was printed by George Tice of the George Eastman House in 1973, fifteen years after Weston's death. [Plate 23]

**WILLOUGHBY, Bob.** (b. Los Angeles, 1927). Willoughby has travelled the world as a magazine photographer for Life, Look, Vogue, Harper's Bazaar). He worked as a specialist in covering motion pictures and since 1952, has worked on over 125 films, including "From Here to Eternity,", "A Star is Born," "The Man with the Golden Arm," "They Shoot Horses Don't They?," and "Catch 22,". His work has appeared in museums and galleries throughout the world, including the Museum of Modern Art, the California Museum of

Science and Industry, the George Eastman House, the World Exhibition of Photography, West Berlin, Central Culturel Americain (Paris), and the Canon Photo Gallery (Amsterdam). [Plate 10]





**Books Containing Other Photographs Taken "In Violation Of" Section 29A**

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**Feature Motion Pictures**
**Made "In Violation Of" Section 29A**
(country of origin - director - year released)

*Alice In the Cities
(West Germany - Wim Wenders, 1974)

Anous Amour
(France - Sandrine Bonaire, 1984)

*Beau Pere
(France - Bertrand Blier, 1981)

*Bilitis
(France - David Hamilton, 1976)

Circle of Two
(U.K. - Jules Dassin, 1980)

*Emerald Forest
(U.S. - John Boorman, 1985)

Gaughin: The Wolf at the Door
(Denmark/France - Donald Sutherland, 1986)

Jail Bait
(Germany - Rainer Fassbinder, 1972)

*L'Adolescente
(France - Jeanne Moreau, 1979)

Laura
(U.K. - David Hamilton, 1979)

*Light of Day

(U.S. - Paul Schrader, 1987)

*Murmur of the Heart
(France - Louis Malle, 1971)

*The Mission
(U.K. - Roland Jaffe, 1986)

*My Life As A Dog
(Sweden - Lasse Hallstrom, 1987)

Nea: The Young Emmanuelle
(France - Nelly Kaplan, 1976)

Paradise
(Canada - Stuart Gillard, 1981)

*Pixote
(Brazil - Hector Babenco, 1980)

*Pretty Baby
(U.S. - Louis Malle, 1978)

*Shadows of Forgotten Ancestors
(Russia - Sergei Parajanov, 1964)

A Summer in San Tropez
(France - David Hamilton, 1981)

*Tender Cousins
(France - David Hamilton, 1980)

To The Devil...A Daughter
(U.K. - Peter Sykes, 1976)

*Walkabout
(U.K. - Nicholos Roeg, 1970)

*The Wrong Move



(Germany - Wim Wenders, 19--)

* indicates videocassette versions, as well as general distribution

Plate A

Plate B

Plate C

Plate D

Plate E



**Paintings Made "In Violation Of"**
**Section 29A, Plates A-E**

Plate A: Dod Procter, Untitled, from Private Collection.

Plate B: Balthus, "Nu de profil, 1973-7". In Balthus. New York: Harper & Row, 1983.

Plate C: Balthus, "Getting Up, 1975-8". In Leymarie, Jean. Balthus. New York: Rizzoli, 1982.

Plate D: Graham Ovenden, "The Three Muses". In Ovenden, Graham. Graham Ovenden. London/New York: St. Martin's Press/Academy Editions, 1987.

Plate E: Graham Ovenden, "Cockney Graces, 1984". In Ovenden, Graham. Graham Ovenden. London/New York: St. Martin's Press/Academy Editions, 1987.

Appendix C-3

## Bibliographic Sketches of Painters, Plates A-E

**BALTHUS, Stanislas Klossowski de Rola.** Balthus's career began in 1934 at the Galerie Pierre in Paris, then one of the focal points of Surrealism. He did not actually begin selling paintings until 1938, when an American collector purchased his masterpiece, "The Street". He is a modern master whose nudes of pubescent and adolescent girls and landscapes hang in museums all over the world, including the Metropolitan Museum of Art, where a major retrospective was held of his work in 1986, the Museum of Modern Art, the Centre Georges Pompidou, the Philadelphia Museum of Art, and the Hirshhorn Museum (Smithsonian).

**OVENDEN, Graham.** (b. UK, 1943) Ovenden attended the Royal College of Art from 1965-68. One-man exhibitions were held at the Piccadilly Gallery, London, in 1970, 72, 77, 79 and 87, and an exhibition of prints was held at the Waddington Galleries, London, in 1970. He is co-author with Robert Melville and David Cecil of numerous books on nineteenth century photography published by Academy Editions. Along with Ann and Graham Arnold, Peter Blake, David Inshaw, and his wife, Annie Ovenden, Graham Ovenden is a member of the Brotherhood of Ruralists, who share a passionate concern for English artistic skill and craftsmanship and who see their work as the celebration of the visual tradition in English art, and its ultimate



source, the spirit of the countryside. In 1988, Parco, in Japan, undertook a an major exhibition of Ovenden's photographic work, as well as paintings, drawings, and Victorian photographs from his extensive collection.

**PROCTER, Dod.** (b. UK 1982, d. 1972) Procter graduated from the Royal Academy of Art and was featured in its yearbooks in nearly every year from her graduation up until about 1930. Her work has received considerable attention over the past 5 years with the revival of the Newlin school (See Painting in Newlin, 1900-1930, London: British Arts Council, 1985.) Her work is in collections at the Tate Gallery, the Birmingham, Manchester, and Sheffield Galleries, the National Gallery of Canada, and the National Gallery of Victoria (Melbourne). She is best known for her works depicting women, particularly adolescent females.